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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

KHUSHRO GHANDHI, ANDREW ROTSTEIN, RICHARD MAGRAW, JACQUELINE COTTON, MATTHEW MORIARTY, ELIZABETH MORIARTY, STUART BERNSEN, RANDOLPH WEDLER, and BARBARA GETTEL,

Petitioners,

—

VS.

GERALD FAYED, PHILIP MERCADO, and VERNON HIGGINS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a paid FBI informer, who engaged in activities which were found not to be authorized or approved by his FBI supervisors, is a government agent for purposes of a *Bivens* action.

2. Whether a pretrial order under F.R.C.P. Rule 16(e) should be liberally construed to encompass claims implicitly made against two FBI supervisors.

3. Whether a *Bivens* plaintiff seeking declaratory and injunctive relief and damages for First Amendment violations is entitled to a *de novo* review of findings of fact made by a district court.

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OPINIONS BELOW

By order dated January 23, 1986, the Honorable Horace Gilmore, District Judge in the United States District Court for the Eastern District of Michigan, granted a motion to dismiss under Rule 41(b) of the Federal Rules of Civil Procedure brought on behalf of the three defendants. Said motion was submitted upon the conclusion of the plaintiffs' proofs at trial and the reasons for granting same were stated on the record by Judge Gilmore.

On July 13, 1987, the order of the District Court was affirmed by the United States Court of Appeals for the Sixth Circuit. The reasons of the three judge panel is contained in a published

opinion captioned *Ghandi v. Police Department of the City of Detroit*, 823 F.2d 959 (6th Cir., 1987). A timely petition for rehearing en banc was filed. This petition was denied on August 31, 1987. See *Ghandi v. Police Department of the City of Detroit*, id.

JURISDICTION

The judgment of the Court of Appeals was entered on July 13, 1987. The petition for rehearing en banc was denied on August 31, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULES PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

18 U.S.C. 2511(2)(c) provides that:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

42 U.S.C. 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

> Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. 1985(3) provides in part that:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, . . .; in any case of conspiracy set forth in this section, if one or more persons engaged therein do or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury against any one or more of the conspirators.

42 U.S.C. 1986 provides in part that:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section [42 U.S.C. 1985], are about to be committed, and having the power to prevent or aid in preventing commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured . . .

Rule 16(e) of the Federal Rules of Civil Procedure provides that:

> After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order

> following a final pretrial conference shall be modified only to prevent manifest injustice.

Rule 41(b) of the Federal Rules of Civil Procedure provides in part that:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.

Rule 52(a) of the Federal Rules of Civil Procedure provides in part that:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, . . . Findings of fact, whether based upon oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

STATEMENT OF THE CASE

This case, with a history of four reported opinions [see *Ghandi v. Police Department of the City of Detroit*, 823 F.2d 959 (6th Cir., 1987); *Ghandi v. Police Department of the City of Detroit*, 747 F.2d 338 (6th Cir., 1984); *Ghandi v. Police Department of the City of Detroit*, 74 F.R.D. 115 (E.D. Mich., 1977); *Ghandi v. Police Department of the City of Detroit*, 66 F.R.D. 385 (E.D.Mich., 1975)], raises issues of profound importance regarding the constitutional status of paid government informers and the relationship of such informers to their law enforcement supervisors. The complaint, [Appendix, A-17] brought by fourteen individual members of the National Caucus of Labor Committees (NCLC), alleged First Amendment and other

constitutional violations proscribed by 42 U.S.C. 1983, 1985(3), 1986 as well as *Bivens v. Six Unknown Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), and prayed for declaratory and injunctive relief as well as damages. The defendants included the United States Department of Justice, the Federal Bureau of Investigation, the Police Department of the City of Detroit, and individual officials thereof.

Beginning in 1968, [A-42] the FBI conducted a domestic security investigation of the NCLC. This investigation failed to produce a single indictment, presentation to a grand jury, or any other instance of criminal misconduct by the NCLC or its members. On April 25, 1974, Vernon Higgins, a man with a history of mental instability and violent behavior who previously worked as an FBI informer inside the Ku Klux Klan, [A-42] encountered an NCLC member distributing literature at a shopping center. On the following day, Mr. Higgins went to the NCLC office in Pontiac Michigan, met with Christopher Martinson, the leader of the NCLC in Pontiac, and joined the NCLC purportedly out of agreement with the organization's political goals and methods.

The record shows that on the same day [April 26, 1974] as his first meeting with Martinson, Higgins contacted defendant Gerald Fayed at the Pontiac office of the FBI. "Higgins told Fayed that he thought the NCLC members might be involved in subversive activities and asked whether information on the group would be worth anything to the FBI. Fayed knew at the time that the FBI was already investigating the NCLC generally. Accordingly, Fayed obtained authorization to make payments in the event Higgins supplied information regarding NCLC activities." *Ghandi v. Police Department of the City of Detroit*, 747 F.2d 338, 351 (6th Cir., 1984) (hereinafter referred to as "*Ghandi I*"). Defendant Higgins functioned in the capacity of FBI informer within the NCLC until June 20, 1974.

The allegations in the original pleadings aver that Higgins urged NCLC members to carry out provocative and violent acts; disrupted the internal workings of the political organization; stole files, tapes, mail, and other items from the NCLC office

and from individual members; supplied psychological profiles of NCLC members to the FBI; publicly misrepresented the philosophy and goals of the NCLC; and ran for public office as a candidate of the U.S. Labor Party, the electoral arm of the NCLC in 1974. The plaintiffs' complaint also alleged that FBI informer Higgins carried out these disruptive and provocative acts at the behest of the FBI and individual FBI agents who, *inter alia*, acted "with wanton and reckless disregard" of plaintiffs' constitutional rights. Moreover, FBI agents who acted in a supervisory capacity were charged with being "negligent in their supervision and control of their subordinates."

The Higgins subterfuge came to an abrupt and dramatic end on June 20, 1974. During the previous evening, Mr. Higgins confessed to Mr. Martinson that he was an FBI informer, paid by the Bureau to provide information on the NCLC. That night Higgins accompanied Martinson to the NCLC regional office in Detroit, Michigan where he told the story of his involvement with the FBI to Martinson and other NCLC members in Detroit.

After spending the night in Detroit, Mr. Higgins entered the Detroit office on the following morning and placed a phone call to the FBI in Pontiac claiming to be detained in the NCLC office against his will. This phone call triggered a chain of events which culminated in the FBI and Detroit police executing, pursuant to a warrant, a search of the Detroit NCLC office in the late morning of June 20, 1974. Mr. Higgins was not found in the office that morning since he and Mr. Martinson had left the premises before the search party arrived.

While the search was in progress, Mr. Higgins, then in the company of Martinson and Khushro Ghandhi at the latter's residence, simply walked out the door of the Ghandhi apartment and called the FBI from Ford Hospital in Detroit. Mr. Higgins was picked up by the FBI in the early afternoon of June 20. Defendant Higgins' claim that he was kidnapped was controverted by statements of federal and state prosecutors who refused to press charges and by a Pontiac police polygraph

examiner, who gave Higgins a lie detector test within twenty-four hours of the alleged kidnapping.

The complaint giving rise to this litigation was filed on July 3, 1974 two weeks after the June 20 episode. On April 11, 1975, Judge Damon Keith of the Eastern District of Michigan dismissed the FBI on sovereign immunity grounds, but denied motions to dismiss brought on behalf of Higgins, his supervisors Fayed and Philip Mercado, the Police Department of the City of Detroit, and individual FBI, Justice Department, and Detroit police officials. *Ghandi v. Police Department of the City of Detroit*, 66 F.R.D. 385 (E.D.Mich., 1975).

At the conclusion of the discovery proceedings in September, 1981, the federal defendants, including the FBI informer, Higgins, filed a motion for summary judgment based upon assertions of good faith immunity. This motion was granted on behalf of all federal defendants, Higgins included, in May, 1982 by Judge Horace Gilmore. The first trial in this action proceded against the Police Department of the City of Detroit, Chief of Police, Philip Tannian, and Detroit Police Sgt., Dale Tidering-ton. Upon motion brought at the close of plaintiffs' case at trial, the three defendants were dismissed pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. All dispositive motions were appealed to the United States Court of Appeals for the Sixth Circuit.

On October 18, 1984, the Sixth Circuit reversed and remanded the summary judgment entered for Defendant Higgins and his two immediate FBI supervisors, Fayed and Mercado. *Ghandi I* 747 F.2d 338, 348-52. The Sixth Circuit held that "[t]he record contain[ed] . . . evidence in support of the claim that Higgins acted, not only as an informant, but also as an agent provocateur." *Ghandi I*, 747 F.2d at 349. Furthermore, the *Ghandi I* panel found genuine issues of material fact existed as to whether FBI agents Fayed and/or Mercado "authorized [or] approved . . . unconstitutional conduct" of Higgins. *Ghandi I*, 747 F.2d at 351.

On remand, the District Court conduct a five-day bench trial and granted a Rule 41(b) motion in favor of the defendants

following the presentation of the plaintiffs' case. The District Court, after precluding evidence adduced to show that the FBI supervisors acted with wanton disregard or reckless indifference to plaintiffs' constitutional rights, found "as a matter of fact there is no evidence to hold Agents Fayed and Mercado liable here." [A-12]. As a result of this finding, the District Court declined to make any findings with respect to Higgins, "except to find that if any of such acts were committed, he committed them on his own behalf and not on instructions or on behalf of Agents Mercado or Fayed, and thus there can be no violation of First Amendment rights by Higgins because an individual acting on his own behalf cannot deprive a person of First Amendment rights, there must be governmental action." [A-14] The verdict of the District Court was affirmed on appeal by the Sixth Circuit on July 13, 1987. *Ghandi v. Police Department of the City of Detroit*, 823 F.2d 959 (6th Cir., 1987) (hereinafter referred to as "*Ghandi II*"). The appellants moved for rehearing en banc and were denied same on August 31, 1987.

REASONS FOR GRANTING THE WRIT

I.
THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN HOLDING THAT DEFENDANT HIGGINS WAS NOT A GOVERNMENT AGENT

This case presents for review the applicability of this Court's statement in *dictum* that "a secret governmental informer is [not] to the slightest degree more free from all relevant constitutional restrictions than is any other government agent." *Hoffa v. United States*, 385 U.S. 293, 311, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966). The decision of the District Court declining, as a matter of law, to make findings with respect to government informer, Higgins, failed to follow this Court's pronouncement in *Hoffa* as well as the rulings of the lower courts in progeny cases.

In *United States v. Cella*, 566 F.2d 1266 (9th Cir., 1978), the Ninth Circuit, following the rationale of *Hoffa*, held that an

informer, upon making an agreement with government officials to provide information to them, becomes a government agent. "It is clear that after a meeting with the state district attorneys or or about July 17, 1975, Ray agreed to become an informant and obtain information for the government. Ray was thereafter a government agent and his actions must be viewed accordingly." *United States v. Cella*, 566 F.2d 1266, 1282.

The District Court of New Hampshire found *Hoffa* and *Cella* persuasive in determining that an informer acted "under color of law" for purposes of consensual monitoring under 18 U.S.C. 2511. "It is clear that after initially agreeing to become an informant and to assist the Government agents, Pearson himself was thereafter a Government agent and his actions must be viewed accordingly [citing *Hoffa* and *Cella*]." *United States v. Upton*, 502 F.Supp. 1193, n.1 (D.N.H., 1980). In other cases involving consensual monitoring under 18 U.S.C. 2511, the courts have uniformly held that an informant who records private conversations is a government agent functioning under color of law. *United States v. Rich*, 518 F.2d 980 (8th Cir., 1975); *United States v. Tousant*, 619 F.2d 810 (9th Cir., 1980); *United States v. Shedan*, 651 F.2d 336 (5th Cir., 1982); *United States v. Shields*, 675 F.2d 1152 (11th Cir., 1982); *United States v. Haimowitz*, 725 F.2d 1561 (11th Cir., 1984). This holding controls even when the informer, and not the government supervisor, controls the record equipment and determines which conversations to monitor. *United States v. Shields*, supra; *United States v. Haimowitz*, supra.

In this case, the panel majority attached great significance to the purported distinction between an informer "who is paid a salary to infiltrate an organization full-time" and one who, like Higgins, "receives periodic payment in return for discrete projects performed." *Ghandi II* at n.5. This distinction is not supported by *Hoffa*, *Cella*, or any other case. The *dictum* in the *Hoffa* opinion, by its own terms, is indifferent to whether the informer is paid a salary, paid c.o.d., or even paid at all. The pertinent section speaks only to the constitutional restrictions placed upon "secret government informers." Similarly, the in-

former in *Cella* was not working for money, but for prosecutorial leniency in a case involving unrelated criminal charges.

The basic analytical flaw in the opinions below is the presumption that Mr. Higgins' status as a government agent is contingent upon his acting per the authorization or approval of Fayed, Mercado, or even some other FBI supervisor. This concept of government agency was repudiated by this Court in *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Therein, the majority rejected the argument "that 'under color of' enumerated state authority excludes acts of an official or policeman who can show no authority under state law, state custom, or state usage to do what he did." *Monroe v. Pape*, 365 U.S. 167, 172. As Justice Harlan explained in his concurring opinion, there are extreme "difficulties in explaining the basis of a distinction between authorized and unauthorized deprivations of constitutional rights." *Monroe v. Pape*, 365 U.S. at 201 (Harlan, J. concurring). The civil rights laws passed by Congress do not merely afford relief against state-authorized acts, but also "provide similar remedies against an official who, unauthorized, denied that equal protection of the laws on his own intitiative." *Monroe* at 199 (Harlan).

The appropriate method for determining the government agency *vel non* of an informer is prescribed above in *Cella* and *Upton*. Both of these decisions read *Hoffa* to hold that a government informer becomes a government agent at the point that he agrees with government officials to provide them with information about a targetted person or group of people. Subsequent to this agreement, the informer is regarded as a government agent for all actions taken with respect to the targets.

This is not to say that Mr. Higgins is a government agent for all purposes and all time. As the *Ghandi II* court explains the "[a]cts of police officers in the ambit of their personal, private pursuits fall outside of 42 U.S.C. 1983." *Stengel v. Belcher*, 522 F.2d 438, 441 (6th Cir., 1975). However, *Stengel* also asserts in the very next paragraph that "acts of officers who undertake to perform their official duties are included [under 42 U.S.C. 1983] whether they hew to the line of their authority or overstep it."

Stengel, id. As the record of this litigation makes clear, Mr. Higgins was not someone engaged in a "personal, private pursuit", but an informer who undertook to perform official duties for financial compensation and "overstepped" his authority.

The petitioners urge that, as opposed to the salary/c.o.d. distinction contained in the Circuit Court opinion, a more appropriate "bright-line rule" should be fashioned as suggested by one commentator:

> The term "informers" as used in this Article means persons who are paid by the federal government for information they provide in connection with the government's civil or criminal investigations of other persons. Thus defined, the term "informers" includes both undercover FBI agents and persons who are not FBI agents but who receive financial remuneration from the FBI for information provided.
>
> Donovan, "Informers Revisited: Government Surveillance of Domestic Political Organizations and the Fourth and First Amendments", 33 *Buffalo Law Review* 333, 335, n.9 (1984).

By drawing the bright line minimally "at informers who receive financial compensation for information provided," Donovan, Id., this Court could insure that the courts below would not have to grapple with distinctions in means and amount of payment, that citizens who provided information out of public duty would not become government actors, and that professional informers would receive due notice that their behavior was subject to constitutional standards.

Defendant Vernon Higgins was not a public-spirited citizen who provided information about suspected violations of law, nor was he a bona fide member of the petitioners political organization, who became disaffected and went to the police with his grievances and observations of wrongdoing. Mr. Higgins was a professional informer who worked on behalf of the FBI inside the Ku Klux Klan prior to becoming involved with the NCLC.

Following a chance encounter with members of the NCLC, he asked Special Agent Fayed "whether information on the group 'would be worth anything to the FBI.' " *Ghandi I* at 351. Since Fayed knew the FBI was investigating the NCLC, he accordingly "obtained authorization to make payments in the event Higgins supplied information rgeading NCLC activities." *Ghandi I*. Id. The controlling case law definitively supports holding Mr. Higgins to the standards of any other government agent.

The activities of Mr. Higgins raise an important public policy concern which also favors the petitioners. The dangers which confront a free society were aptly stated by Professor Donnelly who closed his seminal law review article on judicial control over informants with an incisive quote from the English historian, Sir Erskine May:

> Next in importance to personal freedom is immunity from suspicions and jealous observation. Men may be without restraints upon their liberty; they may pass to and fro at pleasure: but if their steps are tracked by spies and informers, their words noted down for crimination, their associates watched as conspirators.—who shall say that they are free? Nothing is more revolting to Englishmen than the espionage which forms parts of the administrative system of continental despotisms. It haunts men like an evil genius, chills their gayety, restrains their wit, casts a shadow over their friendships, and blights their domestic hearth. The freedom of a country may be measured by its immunity from this baleful agency. Rulers who distrust their own people must govern in a spirit of absolutism; and suspected subjects will be ever sensible of their bondage.
>
> Donnelly, "Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs", 60 *Yale Law Journal* 1091, 1131 (1951).

While this Court decided in a triad of cases in 1966 that the use of secret government informers is not unconstitutional *per se*, the split of opinions therein reflects the thorny constitutional

questions posed by this "baleful agency." See *Hoffa v. U.S.*, supra; *Lewis v. United States*, 385 U.S. 206, 87 S.Ct. 824, 17 L.Ed.2d 312 (1966); *Osborn v. United States*, 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed.2d 394 (1966).

Government informers may be a necessary evil, but the maintenance of our constitutional liberties requires that we accept this necessity grudgingly and be ever vigilant to contain the underlying evil at work. The informers' profession is not a noble one. The ranks of government informers, more often than not, are peopled by the desperate and the despicable. As Professor Donnelly noted, such persons are seldom motivated by civic virtue or interest in the public weal: "[t]he informer's motivations are legion. In addition to promises of immunity or leniency he may be prompted by revenge, money, fear, jealousy, friendship with members of the police force, or—in the case of the apostate—a desire to reestablish his value position in the community." 60 *Yale Law Journal* 1091, 1092, n.7. The threat to the free enjoyment of constitutionally-protected rights and privileges is manifest.

One of the most important and practical restrictions placed upon informants is the dictum expressed in *Hoffa* that informers are government agents for constitutional purposes. The constitutional rights of our citizens are secured against government agents, not only by the availability of declaratory and injunctive relief, but also by the remedy of damages. This damages remedy is "intended not only to provide compensation to victims of past abuses, but to serve as a deterrent against future constitutional deprivations as well." *Owen v. City of Independence*, 445 U.S. 622, 651, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980). Although *Owen* was a 42 U.S.C. 1983 case, the same deterrence goals were specifically endorsed by this Court for *Bivens* actions: "[a] federal official contemplating unconstitutional conduct similarly must be prepared to face the prospect of a Bivens action." *Carlson v. Green*, 446 U.S. 14, 25, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980). The role of deterrence should not be underestimated since the prospect of a *Bivens*-type recovery in damages probably might deter renegade informants where respect for constitutional values otherwise would not.

The holdings below ignore this deterrence rationale and encourage informers to engage in "plausible deniability", a practice which gained widespread disapproval this summer following the testimony before the special Iran/Contra congressional committee by former National Security Adviser, John Poindexter. In essence, the rule of law adopted by the District Court and the Sixth Circuit Court of Appeals provides an incentive for secret government informers to withhold information about his or her activities from the FBI or other supervisors. Informers who operate in the shadows are more likely to survive a *Bivens* action than those who dutifully keep their supervisors appraised of their ongoing activities. The law should not countenance this absurd result.

II.
THE COURT OF APPEALS ERRED IN FAILING TO LIBERALLY CONSTRUE THE PRETRIAL ORDER AS REQUIRED BY F.R.C.P. RULE 16(e)

During the course of the trial, plaintiffs' attorney sought to elicit testimony which would show that defendants Fayed and Mercado knew that Higgins was a violent and provocative individual, and therefore, they acted with wanton disregard for the constitutional rights of the plaintiffs. The District Court foreclosed this inquiry ruling that no claims of negligence had been made in the case. On appeal, the plaintiffs pointed out sections in their complaint and amended complaint where the claims of constitutional negligence were asserted and made it clear that the litigation concerned conduct amounting to reckless or wanton disregard, deliberate indifference, and other forms of grossly negligent behavior which can give rise to a constitutional claim. See *Ghandi II*, [A-5].

In *Nishiyama v. Dickson Co., Tenn.*, 814 F.2d 277, 282-3 (6th Cir., 1987), the Sixth Circuit en banc acknowledged the viability of the petitioner's theory of law by holding "gross negligence", "wanton disregard" and "reckless indifference" were actionable under 42 U.S.C. 1983. The application of *Nishiyama* in the

present case would have required a reversal and remand for a new trial against all three defendants. However, the Circuit declined to apply *Nishiyama* because the Pretrial Order did not contain literal allegations of gross negligence or reckless indifference. The petitioners respectfully submit that the Circuit read the Pretrial Order in a niggardly manner which does not comport with the liberal spirit of Rule 16(e) and the Federal Rules of Civil Procedure generally.

The Circuit's strict interpretation of the Pretrial Order condemned a meritorious case of constitutional significance. As Judge Jones observed in his concurring opinion: "The factual allegations of the informant's conduct, as well as the FBI agents' knowledge of such conduct, raise serious constitutional questions concerning the duty of government agents to exercise some modicum of control over their informants and to protect the general public (and investigatory targets) from the illegal acts of such informants." [A-10] Indeed, these allegations were contained in the Pretrial Order.

In the very first section of the Pretrial Order entitled "Plaintiffs' Statement of Claims", the plaintiffs contended: "Mr. Higgins was known to defendants Fayed and Mercado as a disreputable individual with a history of mental instability, lawless activity, and even prone to overt acts of violence." [A-39] The significance of this contention is that the two FBI agents knew that Higgins would engage in provocative behavior such that harm to the plaintiffs' associational activities was "substantially likely to result." *Hays v. Jefferson Co.*, 668 F.2d 869, 873 (6th Cir., 1982) quoting *Rheuark v. Shaw*, 477 F.Supp. 897 (N.D.Tex., 1979).

Further on in the same section of the Pretrial Order, the defendants Fayed and Mercado are identified as "the immediate supervisors of FBI informant Higgins and directed, encouraged, condoned, approved, and/or ratified the unconstitutional actions committed by defendant Higgins." [A-40] This assertion covers the spectrum of supervisory actions or inactions which are "to some degree deliberate rather than inadvertent." *Hays v. Jefferson Co.*, Id. As the *Hays* Court explained:

> The verbal formulations of this concept have varied from gross negligence or recklessness, [citiations omitted], to actions or failures to act which, though not intended to harm the plaintiff, were so likely to violate plaintiffs' rights and cause them injury that the harm was "substantially likely to result," [citation omitted], to "purposeful non-feasance" in the face of a duty to act, [citation omitted], to an apparent requirement of intent, [citation omitted], but in practical terms the underlying concept appears to be similar in the vast majority of cases.
>
> *Hays v. Jefferson Co.*, Id.

The practical terms of the stated claims in the Pretrial Order against Fayed and Mercado comport with this underlying concept.

A fair reading of the entire statement of claims shows that the plaintiffs averred Fayed and Mercado knew Higgins was "a disreputable individual with a history of mental instability, lawless activity, and even prone to overt acts of violence"; that Higgins performed numerous provocative and disruptive actions inside the NCLC; and that Fayed and Mercado in their supervisory capacity over Higgins "directed, encouraged, condoned, approved, and/or ratified the unconstitutional actions committed by defendant Higgins." Although the Pretrial Order does not use the precise formulation of "gross negligence" or "reckless disregard", this should not be fatal to the petitioners' case against Fayed and Mercado. The courts have previousaly ruled that "[w]hen interpretation of a pretrial order is necessary, the court should not follow an inflexible approach; pretrial orders should be liberally construed." 3 *Moore's Federal Practice* 16-77.

In *Trujillo v. Uniroyal Corp.*, 608 F.2d 815 (10th Cir., 1979), Court declared that, even at their best, pretrial orders should be "liberally construed to cover any of the legal or factual theories that might be embraced by their language" quoting *Rodrigues v. Ripley Industries, Inc.*, 507 F.2d 782, 787 (1st Cir., 1974). The pretrial order "is a procedural tool to facilitate the

trial of a lawsuit on its merits and not to defeat it on a technicality. We must not allow ourselves to construe the pretrial order in the spirit of a common law pleading." *Century Refining Co. v. Hall*, 316 F.2d 15, 20 (10th Cir., 1963); see also *Howard v. Kerr Glass Manufacturing Co.*, 699 F.2d 330, 333 (6th Cir., 1983) ("pretrial orders should be liberally construed as in the case of pleadings").

Moreover, the cases have held "where there existed a close relationship between an issue set for trial and an issue not designated in the order, the courts, although not always expressly referring to Rule 16, have held that the new issue could be considered or submitted at trial." See Annotation, "Considerations or Submission at Trial, Under Rule 16 of Federal Rules of Civil Procedure, or Issues Not Fixed for Trial in Pretrial Order", 11 *A.L.R.Fed.* 786, 805; see also e.g. *Manbeck v. Ostrowski*, 384 F.2d 970 (D.C.Cir., 1967); *Sadowski v. Bombardier Ltd.*, 539 F.2d 615 (7th Cir., 1977); *Miller v. Safeco Title Inc. Co.*, 758 F.2d 364 (9th Cir., 1985); *McCulloch Motors Corp. v. Oregon Saw Chain Corp.*, 245 F.Supp. 851 (D.C.Cal., 1963); *NRT Metals Inc. v. Manhattan Metals*, 576 F.Supp. 1046 (S.D.N.Y., 1983); *Lake Tahoe Sailboat Sales & Charter Inc. v. Douglas Co.*, 566 F.Supp. 308 (D.C.Nev., 1983). While the petitioners submit the claims against Fayed and Mercado sufficiently, albeit imprecisely, met the liberal requirements of Rule 16, nonetheless if it is construed as advancing a new issue, it is obviously close enough to the designated claims and issues that it should have been considered by the trial court.

Finally, the defendants cannot claim undue surprise or prejudice to their contemplated defense at trial. The pleadings noticed them that gross negligence, deliberate indifference, and reckless disregard were at issue in this case. The Pretrial Order expressly called into question the role of Fayed and Mercado as supervisors of Higgins, the degree to which they were aware of his "history of mental instability, lawless activity, and . . . overt acts of violence" and whether either of them "directed, encouraged, condoned, approved, and/or ratified [his] unconstitutional actions." The trial court should have permitted the plaintiffs

below to adduce evidence to support the theory of law vindicated in *Nishiyama*.

III.
THE COURT OF APPEALS ERRED IN APPLYING THE CLEAR ERROR STANDARD TO THE PETITIONERS' APPEAL

There is no dispute that if the plaintiffs at trial could demonstrate defendants Fayed and Mercado "authorized [or] approved . . . the unconstitutional conduct" of Mr. Higgins that all three would be liable for the injuries sustained. *Ghandi I* at 351. The District Court, however, found that "there is no evidence that either of these agents authorized, directed or approved unconstitutional conduct by Higgins." This finding was affirmed per F.R.C.P. Rule 52(a) by the appellate court because the "plaintiffs have not argued that these findings are clearly erroneous." [A-7].

The plaintiffs did not argue that the findings were clearly erroneous because this is clearly a First Amendment case requiring the application of a ~~different~~ standard. In *Bose v. Consumers Union*, 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), this Court held that "in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record.' " The *Bose* rule "reflects a deeply held conviction that—judges and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." *Bose* at 510-1.

While the *Bose* rule was announced in a free speech/libel context, the rule manifestly extends to all rights covered by the First Amendment. One of the cases cited as authority for the *Bose* rule was *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933-34, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982), a protracted litigation concerning the First Amendment right of association. Another of the principal cases relied upon by the *Bose* majority was *Edwards v. South Carolina*, 372 U.S. 229, 235, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963) where this Court stated that it

was duty-bound "to make an independent examination of the record" in a situation involving the "constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of [petitoners'] grievances."

In this case, the Circuit Court should have examined the entire record against defendants Fayed and Mercado, a record which shows they were aware that Higgins was running as a U.S. Labor Party candidate and that he took credit card slips and other documents from members of plaintiffs' organization. Liability could attach where Fayed and/or Mercado "implicitly authorized, approved, or knowingly acquiesced in" the unconstitutional conduct of Higgins. The right to *de novo* review is critically important in this action, since there is a significant overlap between unconstitutional acts "implicitly authorized, approved, or knowingly acquiesced in" by supervisors and supervision which is "so reckless or gross negligent" that misconduct is inevitable." *Hays v. Jefferson Co.* at 874, [Accord Section II, *supra*]. The Court of Appeals should have undertaken an independent examination of the record rather than affirming the District Court because the existence of clear error had not been shown.

CONCLUSION

The holdings below remove significant constitutional restraints which the *Hoffa* Court said in *dictum* should govern the conduct of informers. Furthermore, the barring of evidence pertinent to petitioners claims of "gross negligence" or "reckless disregard", coupled with the failure of the appellate court to review *de novo* the findings of the trial court, prevented a determination of the "serious constitutional questions concerning the duty of government agents to exercise some modicum of control over their informants and to protects the general public (and investigatory targets) from illegal acts of such informants."

Based upon the foregoing, the writ of certiorari should be granted.

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

KHUSHRO GHANDHI, ANDREW ROTSTEIN, RICHARD MAGRAW, JACQUELINE COTTON, MATTHEW MORIARTY, ELIZABETH MORIARTY, STUART BERNSEN, RANDOLPH WEDLER, and BARBARA GETTEL,

Petitioners,

vs.

GERALD FAYED, PHILIP MERCADO, and VERNON HIGGINS,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 86-1201

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KHUSHRO GHANDI; ET AL.,
Plaintiffs,

KHUSHRO GHANDI; ANDREW ROTSTEIN; RICHARD MAGRAW; RANDOLPH WEDLER; BARBARA GETTEL; ELIZABETH MORIARTY; MATTHEW MORIARTY; JACQUELINE COTTON; STUART BERNSEN,
Plaintiffs-Appellants,

v.

POLICE DEPARTMENT OF THE CITY OF DETROIT, ET AL.,
Defendants,

GERALD FAYED; MERCADO and VERNON HIGGINS,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed July 13, 1987

Before: MARTIN, JONES, and MILBURN, Circuit Judges.

MILBURN, Circuit Judge, delivered the opinion of the court, in which MARTIN, Circuit Judge, joined. JONES, Circuit Judge. Plaintiffs, members and former members of the National Caucus of Labor Committees ("NCLC"), appeal the district court's entry of an involuntary dismissal pursuant to Federal Rule of Civil Procedure 41(b), in this civil rights action arising from the investigation and infiltration of the NCLC by the Federal Bureau of Investation ("FBI") from 1970 to 1974. For the reasons set forth below, we affirm on the basis of the district court's findings of fact, which have not been challenged on appeal as clearly erroneous.

I.

On July 3, 1974, plaintiffs filed their complaint "alleging that an FBI investigation of the NCLC, the use of defendant Higgins as a paid informant, various unlawful acts committed by Higgins as an informant, and a search of the NCLC Detroit headquarters violated plaintiffs' first, fourth, and ninth amendment rights." *Ghandi v. Police Department*, 747 F.2d 338, 341 (6th Cir. 1984) ("Ghandi I"). Along with Higgins, the named defendants included FBI agents Gerald Fayed and Philip Mercado (as Higgins' supervisors), the FBI, the Detroit Police Department, and several individual Detroit police officers (for participating in the search).

On April 11, 1975, the district court dismissed the claims against the FBI on the basis of sovereign immunity. 66 F.R.D. 385 (E.D. Mich. 1975). After six years of discovery, the district court granted summary judgment in favor of the individual federal defendants on the basis of qualified immunity. On October 21, 1982, the district court granted summary judgment to the uniformed officers of the Detroit Police Department on the ground that they did not participate in the search.

In November of 1982, the case went to trial on plaintiffs' claims against the Detroit Police Department and the individual, nonuniformed police officers. At the close of the plaintiffs' evidence, the district court, which tried the case without a jury, granted the remaining defendants' motion for an involuntary dismissal under Rule 41(b).

On appeal this court affirmed the dismissals of all defendants except FBI agents Gerald Fayed and Philip Mercado and informant Vernon Higgins. In *Ghandi I*, we determined that disputed issues were present "as to whether Higgins' conduct as an informant exceeded the boundaries of legitimate surveillance." 747 F.2d at 349. As to FBI Agent Mercado, we noted that according to NCLC member Christopher Martinson, "Higgins told Martinson that FBI agent Mercado had instructed Higgins 'to suggest provocative actions that were illegal for NCLC and myself [Martinson] to do.' . . . [S]uch orders, if true,

go beyond mere surveillance. . . . Summary judgment in favor of Mercado was error." *Id.* at 351.

Finally, the panel also found summary judgment in favor of FBI Agent Fayed to be inappropriate:

> Opposed to mere surveillance, however, was conduct "confessed" to Martinson by Higgins on June 19, 1974. Higgins told Martinson he had stolen property from Martinson's campaign headquarters "on behalf of the Federal defendants" . . . including two pieces of mail, "a mailing list of friends and parents of U.S. Labor Party members and potential financial contributors." Higgins further advised Martinson that he had been instructed by codefendants Mercado and Fayed to take these materials. . . . Supervisory personnel are subject to liability where evidence establishes that they "authorized [or] approved . . . the unconstitutional conduct of the offending officers." *Hays v. Jefferson County, Kentucky*, 668 F.2d 869, 874 (6th Cir.), *r'hg denied*, 673 F.2d 152, *cert. denied*, 459 U.S. 833, 103 S.Ct. 75, 74 L.Ed.2d 73 (1982). This sworn testimony, although denied by defendants, creates a question of fact prohibiting summary judgment prior to trial.

Id. at 351–52.

On remand, the district court conducted a five-day bench trial. At the close of plaintiff's case, the district court granted involuntary dismissals pursuant to Rule 41(b) as to all defendants. The district court found as a matter of fact that there was no evidence upon which to establish liability against agents Fayed and Mercado. First, the district court found that the FBI agents had not placed informant Higgins in the NCLC as Higgins was already inside the organization before he (Higgins) approached the FBI and offered to provide information. Second, the district court found that agents Fayed and Mercado did not instruct or encourage informant Higgins "to engage in activities designed to disrupt Plaintiffs' activities or discredit their organizations and they did not give him instructions to commit illegal

acts. They told him to perform normal surveillance and information gathering. . . . They told him to withdraw if he could." Joint Appendix at 103. The district court continued:

> Furthermore, they told him he should be a follower not a leader and gave him no instructions to steal mail or in any way engage in the activities that were condemned by the Sixth Circuit in the opinion, such as disruption of NCLC political activities, to sow of [sic] distrust and suspicion among members, provocative conduct that resulted in misrepresentation of the parties' goals, disruption of Martinson's campaign for public office, or participation in violent picket lines, stealing documents and the like. I find as a matter of fact that at no time did either Agents Fayed or Mercado direct Higgins to act in that manner.
>
> There is no evidence that I find that these agents at any time authorized or approved unconstitutional conduct. . . .

Joint Appendix at 103–04.

Finally, the district court dismissed Higgins:

> I am going to make no findings as to whether Higgins did or did not commit any specific acts which Martinson testified he said he had committed except to find that if any of such acts were committed, he committed them on his own behalf and not on instructions or on behalf of Agents Mercado or Fayed, and thus there can be no violation of First Amendment rights by Higgins because an individual acting on his own cannot deprive a person of First Amendment rights, there must be governmental action.
>
> . . . .
>
> Therefore, there can be no claim of First Amendment violation against Higgins alone because the findings of fact I have made are that he did not act as a result of government action. The agents, the FBI agents, the only governmental people involved in this case, did

> not cause, direct, instruct or suggest anything more than mere surveillance and passive information gathering. If Higgins did commit any of the actions plaintiffs claim he committed, he did so on his own, and an individual cannot violate another's First Amemdment rights. There must be state action. Having found no liability on the part of the agents, there can be no liability as to Higgins alone.

In addition, there is no evidence that the agents authorized or approved of those actions if he took them. . . . Joint Appendix at 105–07.

II.

On appeal plaintiffs first argue the district court erred in not considering whether agents Fayed and Mercado were grossly negligent in their supervision of Higgins. In this connection, plaintiffs further argue the district court erred in excluding evidence regarding agent Fayed's knowledge of Higgins' background. Second, plaintiffs argue the district court failed to correctly apply the law in determining that Higgins could not be a state actor based on its earlier finding that the agents did not direct him to commit unconstitutional acts. Finally, plaintiffs argue the district court erred in barring questions related to the search of the NCLC office on June 20, 1974.

A. Gross Negligence—Fayed and Mercado

Plaintiffs argue the district court erred in dismissing agents Fayed and Mercado because the court failed to "make findings based upon considerations of gross negligence, callous or deliberate indifference, reckless disregard or any other culpable state of mind, short of an intentional tort." Brief at 14. In our view, plaintiffs failed to preserve these claims for trial. Plaintiffs' only argument in this regard is that these claims were submitted in their original complaint. However, the issues tried in the pres-

ent case were delineated in the final pretrial order, which superseded the complaint.

The pretrial order "shall control the subsequent course of the action unless modified by a subsequent order." Fed.R.Civ.P. 16(e). "Thus, . . . an attempt to pursue any issue not listed in the order may be rejected by the trial court." 6 C. Wright and A. Miller, *Federal Practice and Procedure* § 1527, at 605 (1971): *see also Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1335 (8th Cir. 1985). The pretrial order filed in the present case contains no allegations of gross negligence, callous or deliberate indifference, or reckless disregard.[1] Rather, in the pretrial order, plaintiffs alleged only simple negligence in stating "defendants Fayer and Mercado negligently failed to prevent this conspiracy."[2] Pretrial Order at 2. Further, plaintiffs alleged that the agents "directed, encouraged, condoned, approved and/or ratified the unconstitutional actions committed by defendant Higgins." *Id.*

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[1] We further note that on repeated occasions the district court expressed its view that negligence was not at issue. *See, e.g.*, Trial Transcript, Vol. I, at 94-95; Vol II, at 119, 157-58. In our view, plaintiffs were under some obligation during these colloquies to inform the court of their view of the relevant issues. However, plaintiff's counsel at one point merely stated that the pretrial order stipulated the relevant issues. *Id.*, Vol. I, at 95. As noted, the pretrial order contains no allegations of gross negligence, callous or deliberate indifference, or reckless disregard.

Moreover, after the court emphasized that the trial would have to be restricted to the issues of (1) whether Higgins' actions exceeded legitimate surveillance, and (2) whether the agents included, encouraged or directed Higgins to commit unconstitutional acts, plaintiff's counsel responded, with no elaboration, "I agree, Your Honor, to a degree." *Id.*The trial record thus lends further support to our view that plaintiffs never adequately brought to the court's attention that they were attempting to hold the agents liable on a theory of gross negligence or deliberate indifference. We further note that plaintiffs never moved for modification of the pretrial order, *see* Fed.R.Civ.P. 16(e), and that plaintiffs made no offer of proof as to their alleged claims of gross negligence or deliberate indifference, *see* Fed.R.Evid. 103(a)(2). Under all these circumstances, we do not believe substantial justice would be served by a reversal of the district court's judgment. *See* Fed.R.Civ.P. 61.

[2] Simple negligence is not sufficient to support a civil rights action for the violation of constitutional rights. *Hays v. Jefferson County*, 668 F.2d 869, 872-74 (6th Cir.), *cert. denied*, 459 U.S. 833 (1982).

As noted earlier, the district court specifically found that the agents "did not instruct [Higgins] or encourage him," and "that at no time did either Agents Fayed or Mercado direct Higgins to act [in an unconstitutional] manner." The district court further found that "there is no evidence that either of these agents authorized, directed or approved unconstitutional conduct by Higgins." Joint Appendix at 103-104. These findings directly address the issues framed by plaintiffs in the pretrial order. As plaintiffs have not argued that these findings are clearly erroneous, the dismissals of agents Fayed and Mercado are affirmed.[3]

B. Governmental Action—Higgins

Plaintiffs argue that even if the dismissals of agents Fayed and Mercado are upheld, we should nonetheless reverse the dismissal of informant Higgins. As noted, the district court held that any unconstitutional acts committed by Higgins could not be considered government action, as is required to support a claim of a violation of the First Amendment. *See generally* 2 R. Rotunda, J. Nowak, and J. Young, *Treatise On Constitutional Law* § 16.1 (1986).

Plaintiffs first argue that Higgins' status as a paid informant per se establishes that he was a governmental actor. In support of this proposition, plaintiffs rely on *Hoffa v. United States*, 385 U.S. 293, 311 (1966), wherein the Supreme Court stated that although the use of informers is a constitutionally acceptable police practice, "[t]his is not to say that a secret government

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[3] For this same reason, we reject plaintiffs claim that the district court erred in excluding evidence regarding Fayed's knowledge of Higgins' background. *See Hale, supra*, 756 F.2d at 1335 ("a party may not offer evidence or advance theories during trial which violate the terms of a pretrial order."); 6 C. Wright and A. Miller, *supra* § 1527, at 605-07 ("testimony . . . on issues not raised in the order . . . may be excluded at the trial."). Here again we note that plaintiffs failed to seek to take advantage of the exception provided in Fed.R.Civ.P. 16(e) "to prevent manifest injustice" as they never sought to amend the pretrial order, or, for that matter, advise the district judge that they intended to proceed on a theory of gross negligence, etc.

informer is to the slightest degree more free from all relevant constitutional restrictions than is any other government agent." Although we of course have no quarrel with this statement of law, we reject plaintiffs' invitation to establish a per se rule that the activities of paid government informants must always be considered government action.

The determination of government action depends on the facts of each case, through "sifting facts and weighing circumstances." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). We have no doubt that paid government informants often are found to be government actors. *See, e.g., United States v. Cella*, 568 F.2d 1266, 1282 (9th Cir. 1978); *Matje v. Leis*, 571 F.Supp. 918, 927 (S.D. Ohio 1983).[4] Nonetheless, we believe courts must look to all the facts to determine whether a paid government informant "may fairly be said to be a [government] actor . . . because he has acted together with or has obtained significant aid from [government] officials, or because his conduct is otherwise chargeable to the State." *Lugar v. Edmundson Oil Co.*, 457 U.S. 922, 937 (1982). Otherwise, the courts will be in essence applying a sort of reverse *respondeat superior* doctrine. *Cf. Stengel v. Belcher*, 522 F.2d 438, 441 (6th Cir. 1975) ("Acts of police officers in the ambit of their personal, private pursuits fall outside of 42 U.S.C. § 1983"), *cert.* dismissed, 429 U.S. 118 (1976).[5]

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[4] Plaintiffs rely heavily on *Matje*, wherein the court stated that "cases which have considered the position of informants in law enforcement activities appear to have uniformly considered the informants to be 'agents' of the police." 571 F.Supp. at 927. We note that in *Matje*, the issue was whether the informant acted "under color of state law" for purposes of satisfying the elements of § 1983. Thus, *Matje* is of limited applicability to the present case because "although . . . conduct satisfying the state-action requirement . . . satisfies the statutory requirement of action under color of state law, it does not follow from that that all conduct that satisfies the under-color-of-state-law requirement would satisfy the . . . requirement of state action." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 n. 18 (1982).

[5] For example, it is surely relevant whether the informant is paid a salary to infiltrate an organization full-time, or whether the informant receives periodic payments in return for discrete projects performed. The former case obviously presents a much more compelling fact situation for a finding that all acts performed by the informant "are chargeable to the state" than does the latter.

Plaintiffs next argue that Higgins should be held, as a matter of law, to have been a state actor because "significant government involvement" underlay Higgins' activities. However, the district court specifically found that any unconstitutional acts committed by Higging "were committed . . . on his own behalf." Joint Appendix at 105. Moreover, the district court also found that Higgins was in place within the NCLC when Higgins approached the FBI and that the agents did not place him there. Joint Appendix at 103. In our view, these findings, which we cannot say are clearly erroneous, require affirmance of the district court's dismissal of Higgins.

C. Evidence Regarding The Search

Finally, we find no error in the district court's restriction on questions regarding the details of the search of the NCLC Detroit offices. This evidence went to plaintiff's assertion that the kidnapping was contrived in order to enable the FBI to obtain a search warrent. Plaintiffs complain that the court refused to hear "powerful circumstantial" evidence that the FBI developed photographs taken during the raid after it was determined Higgins was not kidnapped as well as evidence that the photographs were blown up to obtain serial numbers off office machines and names off contact cards. Plaintiffs correctly point out that this evidence was relevant to their claim that the FBI's purpose in searching the office was not to find Higgins.

However, the district court did not restrict questions regarding whether the defendant agents participated in the planning or execution of the alleged contrived kidnapping. Joint Appendix at 55. After hearing plaintiffs' proof, the court found there was "no involvement" of the agents in the search "beyond Agent Mercado's receipt of information that Vernon Higgins had called [agent] Ball and his suggestion to Ball that he relay that information to the Detroit FBI office." Joint Appendix at 107. "[T]here

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In the present case, Higgins was paid on a "c.o.d. basis" for information delivered to the FBI. *See* Joint Appendix at 146.

is no involvement at all with Agent Fayed in the search." *Id.* at 107-08.

These findings have not been challenged as clearly erroneous. Therefore, any evidence that tended to show the search ws contrived could not have been relevant to the liability of either Fayed or Mercado. Accordingly, it is not "inconsistent with substantial justice" for us to refuse to disturb the district court's judgment on the basis of plaintiffs' claim that the district court erred in limiting the evidence regarding the details of the search. *See* Fed.R.Civ.P. 61; *Ghandi I*, 747 F.2d at 355.

III.

Accordingly, the judgment of the district court is AFFIRMED.

JONES, Circuit Judge, concurring. I concur in Judge Milburn's opinion affirming the judgment of the district court. I write separately only to set forth my interpretation of today's decision. It is my understanding that the district court's dismissal of plaintiffs' claims that the individual FBI agents were grossly negligent in the supervision or handling of their paid informant is affirmed solely because plaintiffs failed to preserve such claims for trial. The factual allegations of the informant's conduct, as well as the FBI agents' knowledge of such conduct, raise serious constitutional questions concerning the duty of government agents to exercise some modicum of control over their informants and to protect the general public (and especially investigatory targets) from the illegal acts of such informants. *Cf. Nishiyama v. Dickson County*, 814 F.2d 277, 281-83 (6th Cir. 1987) (en banc) (state actors' grossly negligent supervision of jail trustee resulting in injury to another may give rise to § 1983 liability).

No. 74-72019 VOLUME V

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KHUSHRO GHANDHI, ET AL.,

Plaintiff,

-v-

GERALD FAYED, ET AL.,

Defendants.

Proceedings had before the Honorable Horace W. Gilmore, United States District Judge, at Detroit, Michigan, commencing Thursday, January 16, 1985.

SESSION OF WEDNESDAY, JANUARY 23, 1986

11:15. I want to go over my notes very carefully.

(Recess taken)

THE COURT: This matter is before the Court on a motion for involuntarily dismissal by all three Defendants under Rule 41(b) of the Federal Rules of Civil Procedure which provides, in pertinent part,

> "After the Plaintiff, in an action tried by the Court without a jury, has completed the presentation of his evidence, the Defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the Plaintiff has shown no right to relief. The Court, as trier of the facts, may then determine them and render judgment against the Plaintiff or may decline to render any judgment until the close of all the evidence. If the Court renders judgment on the merits against the Plainiff, the Court shall make findings as provided for in Rule 52(a)."

So on a 41(b) motion the law is absolutely clear that the Court can make credibility findings and can make determinations of fact, contrary to a motion for a directed verdict in a jury case.

Now, this case has had a long history. It is the oldest case on the Court's docket. It was inherited by this Court from Judge Kennedy. Eventually, several years ago, the action was tried against all Defendants except the three before the Court today, Judge Kennedy having previously granted a motion for summary judgment, dismissing it as to Vernon Higgins, Philip Mercado and Gerald Fayed, the three Defendants here.

The case was tried several years ago, as I say, in this Court, against the Police Department of the City of Detroit, the Federal Bureau of Investigation, Clarence Kelly William Saxbe, and other specifically named people, and the Court, after a full trial there, after a full hearing of Plaintiffs, granted a 41(b) motion.

The Court was affirmed completely on that determination in Ghandhi v. Police Department of the City Detroit, 747 F.2d 338, but the granting of summary judgment as for Vernon Higgins, Philip Mercado and Gerald Fayed, the three Defendants here, was reversed and remanded to this Court by the Sixth Circuit for trial, the Sixth Circuit holding that there were issues of fact.

I want to now deal with the various claims that are made here and make the various findings that are necessary. I start first with Agents Mercado and Fayed. I find as a matter of fact there is no evidence to hold Agents Fayed and Mercado liable here. I find as a matter of fact that Vernon Higgins was in place in the NCLC, in the America Labor Party, when he approached them. They did not place him there.

I find as a matter of fact that they did not instruct him or encourage him to engage in activities designed to disrupt Plaintiffs' activities or discredit their organizations and they did not give him instructions to commit illegal acts. They told him to perform normal surveillance and information gathering, and I think this is brought out by their credible testimony on their response to his canidacy. They told him to withdraw if he could.

Furthermore, they told him he should be a follower not a leader and gave him no instructions to steal mail or in any way engage in the activities that were condemned by the Sixth Circuit in the opinion, such as disruption of NCLC political activities, to sow of distrust and suspicion among members, provocative conduct that resulted in misrepresentation of the parties' goals, disruption of Martinson's campaign for public office, or prticipation in violent picket lines, stealing documents and the like. I find as a matter of fact that no time did either Agents Fayed or Mercado direct Higgins to act in that manner.

There is no evidence that I find that these agents at any time authorized or approved unconstitutional conduct, and we have been fortunate in this case tht we hve had the testimony by cross examination of all three Defendants in the Plaintiffs' case, so it makes it much easier for this Court to make those determinations.

For those reasons, that there is no evidence that either of these agents authorized, directed or approved unconstitutional conduct by Higgins, I will grant the 41(b) motion as to Agents Fayed and Mercado.

Now we turn to consideration of Mr. Higgins. I think it is significant what the Sixth Circuit has said our job is, this Court's job is in this case, particularly with reference to Higgins, and what the claims of the plaintiffs are, and I quote from the opinion of the Sixth Circuit on Pages 348 and 349 of 747 F.2d.

> "Plaintiffs claim that undercover agent Higgins, while acting as an informer for the FBI, engaged in excessive, illegal and abusive conduct with the purpose of disrupting legitimate NCLC political activities. It is their further claim that it was Higgins' purpose, under directions from Defendants Mercado and Fayed, to sow distrust and suspicion among the NCLC membership and others who advocated unorthodox or dissenting political and social views. Further, that his provocative conduct was designed to discourage and frighten others from associating with members of the NCLC and from becoming members. In sum, it is

> their claim that the totality of Higgins' conduct, in excess of legitimate undercover activities, effectively deprived Plaintiffs of their First Amendment rights of freedom of communication and association, as well as other rights."

I am going to make no findings as to whether Higgins did or did not commit any specific acts which Martinson testified he said he had committed except to find that if any of such ascts were committed, he committed them on his own behalf and not on instructions or on behalf of Agents Mercado or Fayed, and thus there can be no violation of First Amendment rights by Higgins because an individual acting on his own cannot deprive a person of First Amendment rights, there must be governmental action.

Now, as they point out in the opinion. On page 350,

> "Finally, it goes well beyond legitimate surveillance for an informant to contrive a kidnapping scenario for the purpose of having the FBI conduct a search of the group's headquarters. Viewing the evidence in a light. Most favorable to the Plaintiffs, as we must, we find that Plaintiffs have alleged a direct injury as a result of Government action," and I emphasize that, "that goes beyond the mere surveillance activity discussed in Tatem. We conclude, therefore, that summary judgment in favor of Higgins was in error."

Therefore, there can be no claim of First Amendment violation against Higgins alone because the findings of fact I have made are that he did not act as a result of government action. The agents, the FBI agents, the only governmental people involved in this case, did not cause, direct, instruct or suggest anything more than mere surveillance and passive information gathering. If Higgins did commit any of the actions plaintiffs claim he committed, he did so on his own, and an individual cannot violate another's First Amendment rights. There must be state action. Having found no liability on the part of the agents, there can be no liability as to Higgins alone.

In addition, there is no evidence that the agents authorized or approved of those actions if he took them, as is discussed on page 351 of the opinion, where the Court says,

> "Supervisory personnel are subject to liability where evidence establishes that they authorized or approved the unconstitutional conduct of the offending officers."

I have found that they did not authorize or approve, so certainly there can be no liability under the First Amendment on that basis.

The claim, very simply, there is no claim for negligence here. The claim is direct First Amendment violation and we have no governmental action and therefore there can be no liability for First Amendment violations on the part of Higgins.

Finally, I want to say a word or two about the search. Now, that issue has been decided, affirmed by the Sixth Circuit, the validity of the search, and that is not before the Court. However, to the extent that it might be, I find there was no involvement of these two agents in the search whatever beyond Agent Mercado's receipt of information that Vernon Higgins had called Ball and his suggestion to Ball that he relay that information to the Detroit FBI office. Certainly that is no involvement sufficient for liability for any Fourth Amendment violation if there were any such claim, and certainly there is no involvement at all with Agent Fayed in the search.

So, for the reasons given, I find there is no basis for liability as against any of the three Defendants, and I will grant the 41(b) motion.

You gentlemen may present judgments.

74-72019

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

KUSHRE GHANDI

v.

JERRY FAYED, PHILLIP MERCADO, & VERNON MICHAEL HIGGENS

Horace W. Gilmore, judge

Decision by Court. This action came to trial or hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

It is ordered and adjudged that the motion for involuntary dismissal under Rule 41(b) presented by all the defendants, at the conclusion opf the plaintiff's proofs, is hereby granted as to all parties.

Judgement of dismissal as to cause is hereby entered.

Approved: /s/
United States District Judge

CIVIL ACTION NO. 4-72019

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

KUSHRE GHANDI, PETER SIGNORELLI, BARBARA GETTLE, RANDOLPH WEDLER, MATTHEW MORIARTY, ELIZABETH R. MORIARTY, LOUIS STEINHARDT, STUART ELLIOT BERNSEN, DONALD GEORGE WIRTANEN, RICHARD S. MCGRAW, STEVEN ROMM, DONAPHIN MULLINS, JACKUELINE COTTON, KENNETH J. DALTON, CHRISTOPHER MARTINSON, ANDREW ROTSTEIN: Individually and as members of the National Caucus of Labor Committees aka United States Labor Party

Plaintiffs,

against

THE POLICE DEPARTMENT OF THE CITY OF DETROIT; PHILLIP TANNIAN, Commissioner of the Detroit City Police Department; DALE TIDERINGTON, Sargeant of the Detroit City Police Department; The Following Known Agents of the Detroit City Police Department; OFFICERS L. BLANE, G. TERRELL, GAMBLIN, R. PERSYN and D. MCKINNEN, and FIVE UNKNOWN OFFICERS, Agents and Officers of the Detroit City Police Department; THE FEDERAL BUREAU OF INVESTIGATION; WILLIAM B. SAXBE, Attourney General of the United States; CLARENCE KELLY, Director of the Federal Bureau of Investigation; Jerry Fayette, Special Agent of the Federal Bureau of Investation; THOMAS J. ROBINSON, Special Agent of the Federal Bureau of Investigation; PHILLIP HERCADO, Special Agent of the Federal Bureau of Investigation; JOHN MINOGUE, Special Agent of the Federal Bureau of Investigation; EDWARD BALL, Special Agent of the Federal Bureau of Investigation; THREE UNKNOWN AGENTS, Special Agents of the Federal Bureau of Investigation; and VERNON MICHAEL HIGGINS, Agent of the Federal Bureau of Investigation and of the Detroit City Police Department

Defendants.

PRELIMINARY STATEMENT

This is an action for injunctive relief and for recovery of civil damages. It is authorized by 42 U.S.C., Sections 1983, 1985 (3), and 1986. The complaint requests that the above named defen-

dants individually, jointly and severally, be enjoined from depriving the plaintiffs from their constitutional rights under the First and Fourteenth Amendments of the United States Constitution. Plaintiffs also pray for damages as a result of being deprived by the defendants of the aforesaid constitutional rights.

JURISDICTION

Jurisdiction is conferred on this court by 28 U.S.C., Section 1343 (1), (3) and (4).

PARTIES

1. Plaintiff Andrew Rotstein, "Rotstein", is a citizen of the United States residing at 739 Delaware, County of Wayne, Detroit, Michigan.

2. Plaintiff Peter Signorelli, "Signorelli", is a citizen of the United States residing at 741 Delaware, County of Wayne, Detroit, Michigan and is a candidate for Governor of the State of Michigan for the United States Labor Party.

3. Plaintiff Barbara Gettle, "Gettle", is a citizen of the United States residing at 741 Delaware, County of Wayne, Detroit, Michigan.

4. Plaintiff Randolph Wedler, "Wedler", is a citizen of the United States residing at 540 West Willow, Lansing, Michigan.

5. Plaintiff Matthew Moriarty, "Moriarty,", is a citizen of the United States residing at 466 Woodland, Ferndale, Michigan and is a candidate for United States Congressional Representative for District 18 for the United States Labor Party.

6. Plaintiff Elizabeth Moriarty, "E. Moriarty", is a citizen of the United States residing at 741 Delaware, County of Wayne, Detroit, Michigan.

7. Plaintiff Lewis Steinhardt, "Steinhardt", is a citizen of the United States residing at 2371 Manson, County of Wayne, De-

troit, Michigan and is a candidate for United States Congressional Representative for District 16 for the United States Labor Party.

8. Plaintiff Stuart Elliot Bernsen, "Bernsen", is a citizen of the United States residing at 2371 Manson, County of Wayne, Detroit, Michigan and is a candidate for State Representative for District 17 from the State of Michigan for United States Labor Party.

9. Plaintiff Donald George Wirtanen, "Wirtanen", is a citizen of the United States residing at 1026 Avenue B, Flint, Michigan and is a candidate for Michigan State Senator for District 25 for the United States Labor Party.

10. Plaintiff Richard S. McGraw, "McGraw", is a citizen of the United States residing at 2139 E. Warren, County of Wayne, Detroit, Michigan and is a candidate for Michigan State Senator for the Fourth District for the United States Labor Party.

11. Plaintiff Steven Romm, "Romm", is a citizen of the United States residing at 600 Gladstone, County of Wayne, Detroit, Michigan and is a candidate for Wayne County Commissioner District Number 8 for the United States Labor Party.

12. Plaintiff Donaphin Mullins, "Mullins", is a citizen of the United States residing at 739 Delaware, County of Wayne, Detroit, Michigan.

13. Plaintiff Jackueline Cotton, "Cotton", is a citizen of the United States residing at 294 Tuxedo, Highland, Michigan and is a candidate for U.S. Congressional Representative for the First Congressional District of the State of Michigan for the United States Labor Party.

14. Plaintiff Khushro Ghandi, "Ghandi", is a citizen of the United States residing at 5913 Fourteenth Street, County of Wayne, Detroit, Michigan.

15. Plaintiff Christopher Martinson, "Martinson", is a citizen of the United States residing at 821 N. Perry St., Pontiac, Michigan and is a candidate for State Senate District Number 17 for the United States Labor Party.

16. Plaintiff Kenneth J. Dalton, "Dalton", is a citizen of the United States residing at 2371 Manson, Detroit, Michigan.

17. Defendant The Police Department of the City of Detroit, "Police Department", is an agency of the city of Detroit and is organized pursuant to and functions under the laws of the city of Detroit and the state of Michigan.

18. Defendant Phillip Tannian, "Tannian", is Commissioner of the Police Department, "Commissioner", and at all material times herein acted in such capacity.

19. Defendant Dale Tiderington, "Tiderington", is a Sargeant in the Police Department and at all material times herein acted in such capacity.

20. Defendant L. Blane, "Blane", is an officer of the Police Department and at all material times herein acted in such capacity.

21. Defendant G. Terrell, "Terrell", is an officer of the Police Department and at all material times herein acted in such capacity.

22. Defendant Gamblin, "Gamblin", is an officer of the Police Department and at all material times herein acted in such capacity.

23. Defendant R. Persyn, "Persyn", is an officer of the Police Department and at all material times herein acted in such capacity.

24. Defendant D. McKinnen, "McKinnen", is an officer of the Police Department and at all material times herein acted in such capacity.

25. Defendants Five Unknown Officers, "Unknown Officers", are each officers of the Police Department and at all material times herein acted in such capacity.

26. Defendant The Federal Bureau of Investigation, "FBI", is an agency of the United States with headquarters located in Washington, District of Columbia.

27. Defendant William B. Saxbe, "Saxbe", is the Attorney General of the United States and is directly in charge of the FBI and at all material times herein acted in such capacity.

28. Defendant Clarence Kelly, "Kelly", is the Director of the FBI and at all material times herein acted in such capacity.

29. Defendant Edward Ball, "Ball", is a Special Agent of the FBI and at all material times herein acted in such capacity.

30. Defendant John Minogue, "Minogue", is a Special Agent of the FBI and at all material times herein acted in such capacity.

31. Defendant Phillip Mercado, "Mercado", is a Special Agent of the FBI and at all material times herein acted in such capacity.

32. Defendant Thomas J. Robinson, "Robinson", is a Special Agent of the FBI and at all material times herein acted in such capacity.

33. Defendant Gerald C. Fayette, "Fayette", is a Special Agent of the FBI and at all material times herein acted in such capacity.

34. Defendants Three Unknown Agents, "Unknown Agents", are each Special Agents of the FBI and each, at all materials times herein, acted in such capacity.

35. Defendant Vernon Michael Higgens, "Higgens", is an agent of the FBI and the Police Department and at all material times herein acted in such capacity.

ALLEGATIONS

COUNT 1

The defendants and their agents under color of the statutes, ordinances, regulations, customs and usages of the State of Michigan and in violation of federal law have in bad faith and with wanton and reckless disregard and in excess of and outside

the perimeter of their statutory and administrative duties arbitrarily and without discretion conspired to and have subjected plaintiffs to a deprivation of their constitutional rights under the first and fourteenth amendments of the United States Constitution and 42 U.S.C., Sections 1983 and 1985 (3) by conspiring to deprive and subjecting plaintiffs to a deprivation of their rights to freedom of speech, assembly and association and to a denial of the equal protection of laws.

The above named defendants singly and in conjunction with one another, themselves or through their agents engaged in or caused to happen the following events:

1. On or about immediately prior to April 25, 1974 Kelly and Saxbe directly or through their respective subordinate agents discussed the National Caucus of Labor Committees, a political party to which the plaintiffs herein are members of, with the intent and purpose to request either Ball, Robinson, Mercado, Fayette or one of the Unknown Agents to conspire with the Police Department in order to disrupt and interfere with the plaintiffs political activity, to deprive them from the equal protection of laws and more specifically to do the same with respect to the electoral campaigns of Signorelli, McGraw, Steinhardt, Martinson, Moriarty, Wirtanen, Bernsen, Cotton and Romm.

2. On or about or immediately prior to April 25, 1974 Kelly, acting pursuant to orders from and under the direction, control and supervision of Saxbe, directly or through his subordinate agents of the FBI, requested either Ball, Robinson Merdado, Fayette, or one of the Unknown Agents, to conspire with the Police Department for purposes set forth in paragraph 1,count 1, of this complaint.

3. On or about or immediately prior to April 25, 1974 Mercado or one of the Unknown Agents directly or through his immediate superiors or subordinates in the FBI, acting pursuant to orders from and under the direction, control and supervision of Kelly and with the direct or constructive knowledge of the remaining defendants specifically referred to in paragraph 2, count 1, of this complaint contacted the Police Department and one or more of its agents or officers named as defendants herein

for purposes of conspiring to deprive plaintiffs of their constitutional rights as heretofore set forth in paragraph 1, count 1, of this complaint and as alleged, infra, in paragraph 8, 9, 10, 11 and 12, count 1, of this complaint.

4. As a direct result of the contact referred to in paragraph 3, count 1, of this complaint, Higgens, a prior agent of the FBI and a demolitions expert, was instructed by Mercado or one of the Unknown Agents to infiltrate the plaintiffs political organization.

5. On or about April 25, 1974 Higgens telephoned the office of the plaintiffs political organization at 821 North Perry Street in Pontiac, Michigan and stated that he was interested in finding out about said organization.

6. On or about April 26, 1974 Higgens pursuant to orders from and under the direction, supervision and control of Mercado or one of the Unknown Agents and Fayette and with the direct or constructive knowledge of other defendants named herein appeared at 821 North Perry Street in Pontiac wherein the engaged in a lengthy conservation with members of the plaintiffs political organization and thereafter attended and actively participated in political meetings in Detroit, Michigan on April 28, 1974 and on May 5, 1974. Furthermore, Higgens attended four other political meetings in Detroit between April 26 and June 19 of 1974, a class in Detroit on the history of the plaintiffs political organization in New York City on May 24-26 of 1974 and two internal meetings of the Pontiac chapter of said organization on May 29, 1974 and on June 17, 1974, both of which were held at the invitation of Higgens and at the residence of Higgens.

7. During the period of May 5 through June 19 of 1974 Higgens had access to the Detroit office and more specifically to the keys thereof, to intelligence files therein, to tapes, to maps and contact cards all of which related to the political activity of the plaintiffs herein and more particularly to the electoral campaigns of Signorelli, McGraw, Steinhardt, Martinson, Moriarty, Wirtanen, Bernsen, Cotton and Romm.

8. During the period of May 5 through June 19, 1974 Higgens acting under the code name "Vista" and pursuant to orders from and under the direction, control and supervision of Mercado or one of the Unknown Agents and one or more of the defendants from the Police Department:

(a) physically removed or duplicated part or all of said files, tapes, maps and contact cards from the Detroit and Pontiac offices of the plaintiffs and submitted the same to one or more of the other defendants named herein;

(b) supplied said defendants with background information on each member and key contacts of the Pontiac and Detroit locals of plaintiffs political organization;

(c) supplied said defendants with information on the lay out of the offices of the plaintiffs political organization in Detroit and Pontiac and of the houses or residences of plaintiffs residing in Detroit and Pontiac;

(d) travelled to New York and was paid to attend the national conference of the National Caucus of Labor Committees wherein, under the direction, supervision and control and with the aid of Minogue he supplied said defendants with information on the national security apparatus of said organization and on leading national members of said organization.

(e) prepared psychological profile studies of some or all of the plaintiffs herein and submitted the same to one or more of the defendants named herein;

(f) examined and reviewed the physical layout of plaintiffs' Detroit offices for purposed of using explosives to destroy said offices;

(g) installed wiretaps on telephones in said offices and installed other "bugging" devices in said offices in order to supply other defendants named herein with information related to the confidential and private activities of the plaintiffs; Each of the foregoing acts committed by Higgens was paid for by Mercado or one of the Unknown Agents and was done with the direct or constructive knowledge of each of the defendants herein and

was done with the intent to use such information in conspiracy for purposes of disrupting and interfering with the plaintiffs political activities and to deprive the plaintiffs from the equal protection of laws. Furthermore such activities, individually and collectively, did deprive plaintiffs of their constitutional rights.

9. On or about June 1, 1974, Higgens pursuant to orders from and under the control, supervision and direction of Mercado, Fayette, or one of the Unknown Agents and with the direct or constructive knowledge of other named defendants informed plaintiffs that he desired to be a candidate for the United States Labor Party for Michigan, State Representative from the 62nd District and thereafter used such candidacy, with the knowledge of his aforementioned superiors, to commit the following acts, each one all of which he continues to commit:

(a) in the course of his electoral campaign Higgens deliberately and with malicious foresight did misrepresent the philosophy, goals, objectives and political aims of his office and more particularly of the plaintiffs political organization in order to cause residents of the State of Michigan entitled to vote for Higgens to view him and said organization with suspicion and doubt. Said conduct of Higgens was designed to unfairly bias said voting against plaintiffs political organization;

(b) Higgens deliberately and with malicious foresight did misrepresent the philosophy, goals, objectives and political aims of Signorelli, Moriarty, Steinhardt, Bernsen, Wirtanen, Cotton and Romm in order to cause residents of the State of Michigan entitled to vote for said candidates to view each and every such candidate with doubt, suspicion, ridicule, fear and apprehension. Said conduct of Higgens was designed to cause said residents not to vote for Signorelli, Moriarty, Steinhardt, Bernsen, Wirtanen, Cotton and Romm and such conduct has caused the candidates, individually and jointly, to suffer such doubt, suspicion, ridicule, fear and apprehension from the voters of Michigan;

(c) on numerous occasions informed Mercado and Fayette or one of the Unknown Agents and officers of the Police Department of the confidential aspects of the campaigns of Signorelli,

Moriarty, Steinhardt, Bernsen, Wirtanen, Cotton and Romm so that the defendants could use such knowledge in furtherance of their conspiracy to deprive plaintiffs of their constitutional rights and on several occasions said defendants followed the aforementioned plaintiffs to campaign meetings for purposes of disrupting said meetings, and did in fact disrupt said meetings.

10. During the period of May 5 through June 19, 1974 Higgens and one or more of the other named defendants met for purposes of preparing a coordinated strategy of latervention to deprive plaintiffs of their right to free speech, freedom of assembly and equal protection of laws and that in furtherance of said intervention a series of police raids, designed solely with the electoral campaigns of Signorelli, McGraw, Steinhardt, Martinson, Moriarty, Wirtanen, Bernsen, Cotton and Romm were planned.

11. In furtherance of the aforesaid conspiracy Unknown Agents with the aid of and in conspiracy with Ball and Robinson or one of the Unknown Agents appeared before the Honorable Judge Evans of the U.S. Magistrates Court of the State of Michigan, County of Wayne, and in bad faith and with deliberate intent or negligent disregard of plaintiffs constitutional rights obtained a search warrant, a copy of which he attached to this complaint as Exhibit "A", which specifically authorized police seizure of Higgens at the Detroit headquarters of the United States Labor Party at 8242 Woodward Avenue in the City of Detroit. All of the remaining defendants had direct or constructive knowledge of the invalidity of said warrant or of the conspiracy to procure the issuance of the warrant improperly.

12. On or about June 19, 1974 the defendants Tiderington, Blane, Terrel, Gamblin, Persyn, McKinnon, Five Unknown Officers and certain unidentified agents of the FBI whom plaintiffs believe to be defendants named herein appeared at the office or the plaintiffs political organization at 8242 Woodward Avenue in the City of Detroit and entered the premises thereon and proceded to systemmatically search for Higgens. Plaintiffs present informed said defendants on numerous occasions that

Higgens was not present and in due course defendants' verified the same; nevertheless defendants contrary to the scope and purpose of said warrant and without probable cause engaged in the following activities all of which plaintiffs aim to be illegal and improper;

(a) defendants seized 12 to 15 contact cards of Canadian citizens working with the National Caucus of Labor Committees;

(b) defendants with the aid of photographic equipment, took pictures of the following items: maps, including penetration and outlay maps of agriculture; took photos of security operations and logs, and photos of all materials on the tops of desks and files;

(c) defendants with the aid of other mechanisms perused all material on bulletin boards and searched and removed plaintiffs box of contact cards;

(d) defendants interrogated plaintiffs present at said offices regarding their political and electoral activities all of which were clearly unrelated to the alleged purpose of the search warrant.

13. Subsequent to June 19, 1974 plaintiffs have observed members of the Police Department surveilling the offices of the Detroit chapter of the National Caucus of Labor Committees and plaintiff Signorelli has been followed by officers of the Police Department, one of whom he observed at his organizations offices on June 19, 1974.

14. Each and every of the plaintiffs herein believe that the defendants will continue to conduct police raids upon their offices and are fearful that such conduct will cause them immediate injury and harm.

15. Each and all of the foregoing acts of the defendants have been committed in bad faith and with wanton and reckless disregard of the plaintiffs constitutional rights and represent an abuse of defendants' statutory authority under state law.

16. Each and all of the foregoing acts of the defendants Saxbe, Kelly, Mercado, Fayette, Robinson, Minogue, and Ball and those of the Unknown Agents were committed directly or in conspirarcy with other named defendants or with direct or con-

structive knowledge thereof and were outside the perimeter of their statutory and administrative duties under federal law and were not such discretionary acts normally requiring the protection of immunity.

17. On the basis of the foregoing acts committed by the defendants the plaintiffs have been deprived of having or exercising their rights and privileges under 42 U.S.C. 1983 and 1985 (3) and on the basis of such acts plaintiffs believe that the defendants will commit further police raids upon plaintiffs Detroit offices or upon the individual residences of said plaintiffs named in this complaint in furtherance of a plan of intervention set forth in paragraph 10, count 1, of this complaint and engage in other such interference to disrupt and destroy the political campaigns of Signorelli, Moriarty, Steinhardt, Bernsen, Wirtanen, Cotton and Romm. If defendants are permitted to continue such conduct plaintiffs will suffer irreparable harm.

18. Plaintiffs are without adequate funds or finances to furnish a bond and that the same is not specifically required by law but is a matter of discretion to be determined by this court.

19. Plaintiffs are without adequate funds or finances to compensate their attorneys for legal counsel herein and plaintiffs have reason to believe that said attorneys will be required to devote considerable time to this matter and that their fees herein should be paid for by the defendants.

PRAYER FOR RELIEF

WHEREFORE, THE PLAINTIFFS RESPECTFULLY PRAY THAT THIS COURT:

1. Permanently enjoin the defendants, their officers, agents, servants and employees, individually and jointly and severally from conspiring to deprive and from depriving the plaintiffs from their first and fourteenth amendment rights under the United States Constitution and more specifically to:

(a) permanently enjoin Higgens from interfering and conspiring to interfere with each plaintiffs right to speak freely, right to

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associate freely, right of privacy and peaceable assembly without being subjected to illegal and improper surveillance and interferance by said Higgens; furthermore that Higgens be specifically enjoined from using explosives to destroy or harm plaintiffs or their offices in Detroit and Pontiac and from further seeking office as a candidate for the National Caucus of Labor Committees or the United States Labor Party and that he be ordered to cease interfering with the political campaigns of Signorelli, Moriarty, Steinhardt, Bernsen, Wirtanen, Cotton and Romm insofar as he has and continues to deliberately misrepresent the philosophy, goals, objectives and political aims of such candidates to the people of the State of Michigan with the intent to deprive said candidates from electoral support and votes from said people; furthermore that Mercado and Fayette and the Unknown Agents be enjoined from individually or in conspiracy or through their agents, subordinates or informers from directly or indirectly interfering with the electoral campaigns of Signorelli, McGraw, Steinhardt, Martinson, Moriarty, Wirtanen, Bernsen, Cotton and Romm;

(b) permanently enjoin Mercado and Fayette and the Unknown Agents from instructing police agents or from recruiting such agents solely for the purpose of infiltrating plaintiffs political organization for the purpose of interfering and conspiring to interfere with each plaintiffs' right to speak freely, right to be free in his or her person, right to move about freely, right of privacy and peaceable assembly without being subjected to illegal and improper surveillance and interference by said agents or from interfering with the electoral campaigns of Signorelli, McGraw, Steinhardt, Martinson, Moriarty, Wirtanen, Bernsen, Cotton, and Romm, all as heretofore referred to as in subparagraph (a) of this paragraph.

(c) permanently enjoin Saxbe and Kelly from individually or jointly instructing named defendants herein or other agents of the FBI or the Police Department from recruiting or appointing agents or informers for purposes of infiltrating the plaintiffs political organization for purposes heretofore set forth;

(d) permanently enjoin the Police Department, its Commissioner and its officer and agents named as defendants in this

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complaint or their agents and employees thereof from entering plaintiffs place of business and political offices for purposes of disrupting their freedom to carry on political activities and freedom of association guaranteed to them under the first amendment of the United States Constitution;

(e) permanently enjoin said federal agents named herein from entering plaintiffs place of business and political offices for purposes of disrupting their freedom to carry on political activities and freedom of association guaranteed to them under the first amendment of the United States Constitution;

(f) order defendants, jointly and severally, to pay plaintiffs attorney fees and all costs of this action.

(2) Pending a trial upon merits of this complaint, issue a preliminary injunction without bond enjoining the defendants in the aforesaid manner;

(3) Pending a hearing on the preliminary injunction and notice of the same as required by law, issue a temporary restraining order without bond restraining said defendants in the aforesaid manner;

(4) Grant such other and further relief as may be appropriate.

ALLEGATIONS

COUNT II

The defendants and their agents under color of the statutes, ordinances, regulations, customs and usages of the State of Michigan and in violation of federal law have in bad faith and with wanton and reckless disregard and in excess of and outside of the perimeters of their statutory and administrative duties arbitrarily and without discretion conspired to and have subjected plaintiffs to a deprivation of their constitutional rights under the fourth and fourteenth amendments of the United States Constitution and 42 U.S.A. Sections 1983 and 1985(3) by conspiring to deprive and subjecting plaintiffs to a deprivation

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of their right to remain free from unreasonable search and seizure.

The above named defendants singly and in conjunction with one another, themselves or through their agents engaged in or caused to happen the following events:

(1) Plaintiffs repeat those allegations set forth in paragraphs 1-5, 7-8, 10-12, 14-19, count one, with the intent to incorporate them herein as though set forth in detail;

(2) On the basis of the foregoing acts committed by the defendants, plaintiffs have been deprived of having or exercising their rights and privileges under the fourth and fourteenth amendments of the United States Constitution and plaintiffs believe that the defendants will commit further unlawful police raids upon their premises and Detroit, Michigan or upon individual residencies of said plaintiffs in furtherance of a plan of intervention set forth in paragraph 10 in count one of this complaint.

PRAYER FOR RELIEF

WHEREFORE, THE PLAINTIFFS RESPECTFULLY PRAY THAT THIS COURT:

(1) Permanently enjoin the defendants, their officers, agents, servants and employees individually, jointly or severlly from conspiring to deprive and from subjecting plaintiffs to a deprivation of their fourth and fourteenth amendment rights under the United States Constitution and more particularly to:

(a) request that Higgins return to plaintiffs all keys or replicas thereof to plaintiffs' place of business in Detroit, Michigan; all intelligence files, tapes maps and contact cards which are in his possession and which were illegally removed from plaintiffs' place of business. In addition, plaintiffs request that said Higgins return to plaintiffs all background information on such members and key contacts of the Detroit and Pontiac chapters of the plaintiffs' political organization; all information on the layout of the offices of the plaintiffs' political organization in

Detroit and Pontiac and of the houses of members in Detroit and Pontiac; all information of the national security apparatus of said organization and all psychological profiles of said plaintiffs that Higgins illegally obtained; and all information obtained from wiretaps or "bugging" devices installed by Higgins;

(b) that Mercado and Fayette and Minogue and the Unknown Agents return to plaintiffs all such items as set forth in sub-paragraph (a) of paragraph 1, which Higgins may have submitted to them and which they illegally retain in their possession; (c) that the remaining defendants listed in this complaint return such items referred to in sub-paragraph (a) of paragraph 1, which they might retain illegally in their possession.

(d) enjoin defendants from continuing to illegally seize all files, tapes, maps, contact cards, background information on members and key contacts, information on the layout of the offices of plaintiffs political organization and residences in Detroit and Pontiac, all psychological profiles of said plaintiffs as well as other items, documents and material, tangible or intangible related to plaintiffs' political activities.

(2) The defendants individually, jointly and severally be ordered to cease from further activity designed to seize from plaintiffs possession those items which they are legally justified in having as part of their political activity;

(3) Order defendants, jointly and severally, to pay plaintiffs attorney fees and all costs of this action;

(4) Pending a trial upon merits of this Complaint, issue a preliminary injunction without bond enjoining the defendants in the aforesaid manner;

(5) Pending a hearing on the preliminary injunction and notice of the same as required by law, issue a temporary restraining order without bond restraining said defendants in the aforesaid manner;

(6) Grant such other and further relief as may be appropriate.

ALLEGATIONS

COUNT III

The defendants and their agents under color of the statutes, ordinances, regulations, customs and usages of the State of Michigan and in violation of federal law have in bad faith and with wanton and wreckless disregard and in excess of and outside the perimeter of their statutory and administrative duties arbitrarily and without discretion conspired to and have subjected plaintiffs to a deprivation of their constitutional rights under the first and fourteenth amendments of the Untied States Constitution and 42 U.S.A. Sections 1983, 1985(3) and 1986 by conspiring to deprive and subjecting plaintiffs to a deprivation of their rights to freedom of speech, assembly and association, freedom from search and seizure and to a denial of the equal protection of laws.

The above named defendants singly and in conjunction with one another, themselves or through their agents engaged in or caused to happen the following events:

(1) Plaintiffs repeat those allegations set forth in paragraphs 1 through 15 of Count One of this complaint and paragraphs1-2 of Count Two of this complaint with intent to incorporate them as though set forth in detail;

(2) As a direct and approximate result of the aforesaid acts of the defendants, Higgins, Mercado, Fayette, Robinson, Ball, Minogue, Three Unknow Agents, Blane, Terrell, Gamblin, Persyn, McKinnon, and Five Unknown Officers, plaintiffs each have been damaged in the sum of $10,000 in so far as they have been deprived of their right to freedom of association, freedom of speech, freedom of assembly, freedom from unlawful search and seizure, and their right to equal protection of the laws under the first, fourth, and fourteenth amendments to the Unitd States Constitution;

(3) Insofar as Kelly, Saxbe, Tannian, and other defendants named herin who are superiors to defendants sepcifically named in paragraph 2, Count III of this complaint, are not directly

responsible for causing plaintiffs to suffer damages they, at all times, were negligent in their supervision and control of their subordinates whose actions each defendant had direct or constructive knowledge of and such negligence and damaged each plaintiff in the sum of $10,000;

(4) As a further direct and approximate result of the aforesaid reckless acts of defendants Higgins, Mercado and Fayett and the Unknown Agents, the plaintiffs Signorelli, McGraw, Steinhardt, Martinson, Moriarty, Wirtanen, Bersen, Cotton and Romm have each suffered damages in the sum of $10,000 in so far as their right to seek respective political offices in the State of Michigan have been interfered with and in so far as their electoral campaigns have been disrupted and harrassed by the activities of such defendants.

(5) Insofar as Kelley, Saxbe, Tannian and other defendants named herein who are superiors to Higgins, Mercado and Fayette are not directly responsible for causing plaintiffs to suffer damages they, at all times herein, were negligent in their supervision and control of their subordinates whose actions each defendant had direct or constructive knowledge of and such negligence has damaged each plaintiff in the sum of $10,000.

PRAYER FOR RELIEF

WHEREFORE:

(1) Each of the plaintiffs named herein claim $10,000 damages from Higgins, Mercado, Fayette, Robinson, Ball, Minogue, Three Unknown Agents, Blane, Terrell, Gamblin, Persyn, McKinnon, and Five Unknown Officers individually, jointly and severally for violations of their first, fourth and fourteenth amendment rights;

(2) Each of the plaintiffs herein claims $10,000 damages from Kelly, Saxbe and Tannian and other defendants named herein who are superiors to those defendants specifically named above individually, jointly and severally, for negligence in their failure

to supervise their subordinates to prevent such actions which damaged plaintiffs;

(3) The plaintiffs Signorelli, McGraw, Steinhardt, Martinson, Moriarty, Wirtanen, Bernsen, Cotton and Romm each further claim $10,000 from Higgins, Mercado and Fayette as damages for violtion of their right to seek respective political offices in the State of Michigan and insofar as their electoral campaigns have been disrupted and harrassed by the activities of such defendants;

(4) Plaintiffs Signorelli, McGraw, Steinhardt, Moriarty, Wirtanen, Bernsen and Cotton each claim $10,000 damages from Kelley, Saxbe and Tannian jointly and severally, and from other named defendants who are superiors of Higgins, Mercado and Fayette for negligence in their failure to supervise their subordinates to prevent such actions which damaged plaintiffs.

Respectfully submitted,

JAY C. CARLISLE II
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One of the attorneys for the Plaintiffs

KENNETH BIRCH
210 Abbott
Lansing, Michigan
One of the attorneys for the Plaintiffs

AMENDED COMPLAINT Civil Action no. 4-72019

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

KUSHRE GHANDI, PETER SIGNORELLI, BARBARA GETTLE, RANDOLPH WEDLER, MATTHEW MORIARTY, ELIZABETH R. MORIARTY, LOUIS STEINHARDT, STUART ELLIOT BERNSEN, DONALD GEORGE WIRTANEN, RICHARD S. MCGRAW, STEVEN ROMM, DONAPHIN MULLINS, JACKUELINE COTTON, KENNETH J. DALTON, CHRISTOPHER MARTINSON, ANDREW ROTSTEIN: individually and as members of the National Caucus of Labor Committees aka United States Labor Party,

Plaintiffs,

against

THE POLICE DEPARTMENT OF THE CITY OF DETROIT: PHILLIP TANNIAN, Commissioner of the Detroit City Police Department; DALE TIDERINGTON, Sargeant of the Detroit City Police Department; The Following Known Agents of the Detroit City Police Department; OFFICERS L. BLANE, G. TERRELL, GAMBLIN, R. PERSYN, AND D. MCKINNEN, AND FIVE UNKNOWN OFFICERS, Agents and Officers of the Detroit City Police Department; THE FEDERAL BUREAU OF INVESTIGATION: WILLIAM B. SAXBE, Attorney General of the United States; CLARENCE KELLY, Director of the Federal Bureau of Investigation; JERRY FAYETTE, Special Agent of the Federal Bureau of Investigation; THOMAS J. ROBINSON, Special Agent of the Federal Bureau of Investigation; PHILLIP MERCADO, Special Agent of the Federal Bureau of Investigation; JOHN MINOGUE, Special Agent of the Federal Bureau of Investigation; EDWARD BALL, Special Agent of the Federal Bureau of Investigation; THREE UNKNOWN AGENTS, Special Agents of the Federal Bureau of Investigation; and VERNON MICHAEL HIGGENS, Agent of the Federal Bureau of Investigation and of the Detroit Police Department,

Defendants.

AMENDED COMPLAINT

Count I

1. All the allegations of the original Complaint are hereby incorporated by reference and the facts therein described also form the basis of this claim.

2. The actions of the defendants heretofore described constitute an invasion of the plaintiffs' privacy protected under the penumbra of the First to Ninth Amendments to the United States Constitution.

3. Plaintiffs Signorelli and Steinhardt were bodily searched and touched by defendants in an unlawful manner which was rude and insolent and constituted a violation of the Fourth Amendment of the United States Constitution.

4. The plaintiffs allege that the defendants actions violated their right against illegal search and seizure as stated above.

5. The plaintiffs allege that the defendants' actions violate their right to freedom of speech and association in that defendant Higgins affirmatively represented himself to be a member of the United States Labor Party and made such statements as would injure or subvert their political and philosophical reputation.

6. The plaintiffs allege that the actions of the defendants violate their right to due process of law under the Fifth and Fourteenth Amendments of the United States Constitution.

7. The plaintiffs have fear in exercising their rights under the First Amendment to the United States Constitution because they believe that defendants will harrass and injure them; and that defendants will destroy and steal personal documents and property.

WHEREFORE plaintiffs demand judgement of $10,000 for each plaintiff and request costs and reasonable attorneys fees.

Count II

1. All the allegations of Count I of the Amended Complaint and all the allegations of the original Complaint are hereby incorporated by reference and the facts therein described also form the basis of this Claim.

2. Jurisdiction for this Claim is based upon the theory of pendent jurisdiction. *United Mine Workers of America* v *Gibbs*, 383 U.S. 715, 86 S Ct 1130 1966.

3. The action of the defendants as described herein constitute tortious activity which give rise to causes of action by plaintiffs under the law of Michigan.

4. In addition to the aforementioned tortious activities, plaintiffs Signorelli, Steinhardt, Moriarty, Gettle, Wedler, Bersen, Cotton, and Romm allege that defendants' action on June 20, 1974 constitute assault in that:

a. plaintiffs were put in fear of their life and bodily safety by all defendants present;

b. various defendants pointed a shotgun and other weapons at them;

c. plaintiffs suffered mental anguish from being confronted and severe mental distress at the instigation of all defendants;

d. all defendants intended to inflict severe mental distress upon the plaintiffs;

e. all defendants were at all times mentioned in this complaint acting under color of state and federal law.

WHEREFORE the plaintiffs demand $100,000. in damages plus costs and reasonable attorneys' fees.

DATED: 7-22-74 BY: /s/

Kenneth A. Birch P 10810
One of the attorneys for plaintiffs
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East Lansing, Michigan

Jay C. Carlisle II
230 Park Avenue
New York, New York 10017
One of the attorneys for plaintiffs

Civ. No. 74-72019 Hon. Horace Gilmore

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

KHUSHRO GHANDHI, ET AL.,

Plaintiffs,

v.

GERALD FAYED, ET AL.,

Defendants.

PRETRIAL ORDER

1. Plaintiffs' Statement of Claims

This is a *Bivens* and civil rights conspiracy action brought for declaratory and injunctive relief and damages. See *Bivens v. Six Unknown Names Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and 42 U.S.C. 1985(3), 1986. Plaintiffs contend the FBI working through its agents Fayed and Mercado infiltrated an informant, Vernon Michael Higgins, into plaintiffs' organizations, the National Caucus of Labor Committees and the U.S. Labor Party. Mr. Higgins was known to defendants Fayed and Mercado as a disreputable individual with a history of mental instability, lawless activity, and even prone to overt acts of violence.

The infiltration of Vernon Higgins was done even though the FBI had no "adequate foundation" for conducting an investigation of the subject organization. *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963). While posing as a member of the NCLC, defendant Higgins committed disruptive acts, including publicly misrepresenting the NCLC as a violent organization; urged the NCLC to commit provocative acts contrary to the NCLC philosophy; participated in violent activity; publicly misrepresented the campaigns of the U.S. Labor Party; stole mail and tapes belonging to members of the

NCLC; let his name be put on the ballot as a U.S. Labor Party candidate for state representative; and contrived a kidnapping scenario as a pretext to bring on a search of the Detroit NCLC office. These acts abridged the First Amendment rights of speech and association, *N.A.A.C.P. v. Alabama*, 360 U.S. 240 (1958); *Bates v. Little Rock*, 361 U.S. 516 (1960); *Gibson v. Florida Legislative Investigation Committee*, *supra*, as well as other "prenumbral" rights protected by the U.S. Constitution. *See* Amended Complaint; *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Defendants Fayed and Mercado were the immediate supervisors of FBI informant Higgins and directed, encouraged, condoned, approved and/or ratified the unconstitutional actions committed by defendant Higgins. Defendants conspired with each other and other persons, either by express or tacit agreement [see *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979)] to deprive the plaintiffs of equal protection and equality of right. Further, defendants Fayed and Mercado negligently failed to prevent this conspiracy. *See* 42 U.S.C. 1985(3), 1986.

2. Statement of Defendants' Defenses.
First Amendment Claims

Law enforcement agencies may properly utilize the services of paid informants to gather information concerning the activities of organizations under investigation. Only the abusive or excessive use of informants through tactics which clearly exceed legitimate infomation-gathering and are designed to disrupt the lawful "speech" activities of an organization may rise to the level of a violation of the First Amendment.

Vernon Higgins' infomant activities as a member of the NCLC and USLP were not abusive or excessive and did not exceed legitimate information-gathering. Therefore, his actions were not violative of the First Amendment.

Gerald Fayed specifically instructed Vernon Higgins to limit his infomant activities to mere information-gathering concerning

possible NCLC violations of federal or state law. Neither Gerald Fayed nor Philip Mercado encouraged, authorized or approved any conduct by Higgins as an NCLC informant which exceeded mere information-gathering. Therefore, their actions were not violative of the First Amendment.

Even assuming Higgins' informant activities exceeded legitimate surveillance of the plaintiffs, neither Mercado nor Fayed may be held vicariously liable for his conduct.

Fourth Amendment Claim

The search of NCLC headquarters on June 20, 1974, was properly conducted pursuant to a search warrant lawfully issued based upon probable cause to believe that Higgins was being held against his will at that location.

Higgins' conduct was not violative of the Fourth Amendment since his sole involvement in the search was to properly contact the FBI to request assistance in securing release from his captors.

Fayed's conduct was not violative of the Fourth Amendment since he had no involvement in the search whatsoever. Fayed had ceased to be Higgins' contact within the FBI approximately one week before the search was conducted. He had to input in any of the decisions leading to the procurement of the search warrant and he did not participate in the actual search. He never conspired the Higgins to contrive a pretext for a search of NCLC headquarters.

Mercado's conduct was not violative of the Fourth Amendment since his sole involvement in the search was to instruct FBI agent Edward Ball to report Higgins' call for assistance to FBI headquarters in Detroit. He had no input in any of the decisions leading to the procurement of the search warrant and he did not participate in the actual search. He never conspired with Higgins to contrive a pretext for a search of NCLC headquarters.

3. Stipulated Facts

1. From either 1968 or 1970 to 1977, the Federal Bureau of Investigation conducted a domestic security investigation of the Ntional Caucus of Labor Committees.

2. As part of the NCLC investigation, the FBI also conducted a domestic security investigation of the United States Labor Party.

3. Vernon Higgins served as a paid informant for the FBI inside the Ku Klux Klan.

4. Vernon Higgins ran for state representative as a U.S. Labor Party Candidate and his name appeared on the ballot in November, 1974.

5. On June 20, 1974, FBI agents and Detroit police officers conducted a search of the Detroit NCLC office to locate Vernon Higgins.

6. Vernon Higgins was not in the NCLC office at the time of the search.

7. The FBI located Vernon Higgins at the Ford Hospital in the afternoon of June 20, 1974.

8. The photographs taken inside the Detroit NCLC office on June 20, 1974, were sent to the FBI Laboratory in Washington, D.C.

9. Plaintiffs were all members of the NCLC and USLP between April 1, 1974, and June 20, 1974.

10. Gerald Fayed and Philip Mercado were Special Agents with the FBI assigned to the Pontiac, Michigan resident agency during this period.

11. Fayed was assigned the responsibility of conducting the NCLC investigation in the Pontiac area when he was transferred to the Pontiac resident agency.

12. From late April 1974 until June 20, 1974, Vernon Higgins, while a member of the NCLC, provided information to the FBI regarding NCLC activities in the Pontiac area.

13. Fayed, pursuant to this domestic security assignment was Higgins' reporting agent.

14. Fayed secured authorization from FBI headquarters to pay Higgins for providing information concerning NCLC activities.

15. Throughout May and early June 1974 Higgins supplied Fayed with information concerning NCLC activities on numerous occasions and received several cash payments.

16. In May 1974, Higgins discussed with NCLC members that he attended the National Conference of the NCLC in New York. He subsequently attended this conference with Fayed's approval and was paid transportation and lodging expenses by the FBI.

17. In May 1974, Christopher Martinson asked Higgins to run for the Michigan Legislature on the USLP ticket. Higgins agreed and his name subsequantly appeared on the ballot in November 1974.

18. In early June 1974, Fayed's investigatory responsibilities in the Pontiac agency were changed by his superiors in the FBI from domestic security to organized crime. As a result, Mercado inherited Fayed's domestic security assignments.

19. Due to this shift in responsibilities, Mercado became Higgins' reporting agent on June 12, 1974.

20. On June 20, 1974, the Detroit Police Department secured a warrant to search NCLC headquarters in Detroit. This warrant was issued by Judge Robert Evans and stated the object of the search was Vernon Higgins.

21. On June 20, 1974, Detroit Police Officers accompanied by William Jones and three other FBI agents executed this warrant. Neither Fayed nor Mercado participated in the search.

22. Higgins was not located during this search. He had left NCLC headquarters before the party arrived.

4. Issues to be litigated (disputed facts)

1. Plaintiffs maintain that the FBI paid Higgins to make contact with the NCLC and to attempt to "infiltrate" the organization.

Defendants maintain the Higgins joined the NCLC on his own initiative and then voluntarily approached Fayed with the offer to provide information to the FBI concerning NCLC activities in the Pontiac area.

2. Plaintiffs maintain that Higgins was encouraged by Fayed and Mercado to become a USLP candidate in order to discredit the organization during the course of his candidacy and to prevent the USLP from presenting a viable candidate for the office.

Defendants maintain that Higgins became a USLP candidate for the Michigan State Legislature at the request of NCLC leader Christopher Martinson against the specific instructions of Fayed and that Fayed had no knowledge of or involvement in any actions Higgins may have undertaken pursuant to his candidacy.

3. Plaintiffs maintain that Higgins' informant activities exceeded legitimate surveillance of the NCLC and were intended to disrupt and discredit the organization.

Defendants maintain that Higgins, while an informant within the NCLC, limited his activities to the mere gathering of information acquired through the normal course of his NCLC membership.

4. Plaintiffs maintain that Mercado and Fayed encouraged Higgins to engage in acts designed to create distrust within the NCLC and to disrupt and discredit the organization.

Defendants maintain that Higgins was instructed by Fayed to limit his NCLC informant activities to mere information-gathering. Also, during Mercado's short period of contact with Higgins he gave him no instructions whatsoever.

5. Issues of Law

A. *Statement of the Plaintiffs' Issues of Law to be Litigated*

1. Were the speech, associational, and other constitutional rights of the plaintiffs violated by the defendants?

2. If the constitutional rights of the plaintiffs were violated by the defendants, are defendants Fayed and Mercado entitled to good faith or qualified immunity?

3. Is defendant Higgins entitled to immunity, and if so, is he entitled to good faith immunity herein?

4. Did the defendants conspire with each other and/or any third parties to deprive the plaintiffs of their civil rights as contemplated by 42 U.S.C. 1985(3)?

5. If a 1985(3) conspiracy exists, did defendants Fayed and Mercado negligently fail to prevent the unlawful actions of said conspiracy?

B. *Statement of the Defendants' Issues of Law to be Litigated*

1. Whether Higgins' informant activities violated plaintiffs' First Amendment rights by exceeding legitimate surveillance and intentionally disrupting plaintiffs' lawful speech activities.

2. Whether Mercado or Fayed authorized or approved any actions by Higgins which intentionally disrupted plaintiffs' lawful speech activities.

Whether the defendants conspired to create a pretext for the June 20, 1974, search of NCLC headquarters.

6. *List of Witnesses for Plaintiffs*

1. Khushro Ghandhi
2. Richard Magraw
3. Andrew Rotstein
4. Jacqueline Cotton
5. Elizabeth Moriarty

6. Matthew Moriarty
7. Randolph Wedler
8. Barbara Gettel
9. Stuart Bernsen
10. Vernon Higgins
11. Gerald Fayed
12. Philip Mercado
13. William Jones
14. Thomas Robinson
15. Gerard Alexander
16. Edgar Horton
17. Robert Irvin
18. Edward Ball
19. Robert Ridgway
20. Neil Welch
21. Edward Horrigan
22. Harold Mertz
23. Allan Crouter
24. Dale Tiderington
25. Gary Snyder
26. Kenneth Dalto
27. Christopher Martinson
28. Thomas Szymecko
29. Sharon Higgins
30. C. Olson
31. J. Kimble
32. J. Rozanski
33. Emma Higgins
34. James Lilley
35. John Mlynarcyk
36. Michael Hendrix
37. Arnold Sheard
38. John Van Haaren
39. Jesse Coulter
40. Robert Bates
41. Pat Livingston
42. Stan Kline
43. F.E. Wicklund, Jr.
44. Robert Meyers

45. Wendell Lochbiller
46. James Heiligenthal
47. Corporal Valet
48. John Nichols
49. Gerald Rose
50. Suzanne Ketcham
51. Marsha Freeman
52. Detroit Police Department Custodian of Records
53. Pontiac Police Department Custodian of Records
54. Michigan State Police Custodian of Records
55. Detroit FBI Custodian of Records
56. FBI Headquarters Custodian of Records
57. Ford Hospital Custodian of Records
58. Town Hospital Custodian of Records

7. *List of Witnesses for Defendants*

1. Gerald Fayed
2. Philip Mercado
3. Vernon Higgins
4. Edward Ball
5. William Jones
6. Thomas Robinson
7. Robert Ridgeway
8. Custodian of Records (Robert Scherrer and Mary Richardson)

8. *Plaintiffs' List of Exhibits*

1. Deposition of William Jones
2. Deposition of Thomas Robinson
3. Deposition of Edward Ball
4. Deposition of Philip Mercado
5. Deposition of Gerald Fayed
6. Deposition of Vernon Higgins
7. Deposition of Christopher Martinson
8. Deposition of Kenneth Dalto
9. Deposition of Stephen Romm
10. Deposition of Jacqueline Cotton

11. Deposition of Randolph Wedler
12. Deposition of Barbara Gettel
13. Detroit Police file on Stuart Bernsen
14. Detroit Police file on Kenneth Dalto
15. Detroit Police file on Barbara Gettel
16. Detroit Police file on Richard Magraw
17. Detroit Police file on Stuart Bernsen
18. Detroit Police file on Kenneth Dalto
19. Detroit Police file on Barbara Gettel
20. Detroit Police file on Richard Magraw
21. Detroit Police file on Christopher Martinson
22. Detroit Police file on Matthew Moriarty
23. Detroit Police file on Doniphan Mullins
24. Detroit Police file on Stephen Romm
25. Detroit Police file on Andrew Rotstein
26. Detroit Police file on Peter Signorelli
27. Detroit Police file on Randolph Wedler
28. FBI file on Khushro Ghandhi
29. FBI file on Peter Signorelli
30. FBI file on Barbara Gettel
31. FBI file on Randolph Wedler
32. FBI file on Matthew Moriarty
33. FBI file on Elizabeth Moriarty
34. FBI file on Stuart Bernsen
35. FBI file on Richard Magraw
36. FBI file on Steven Romm
37. FBI file on Doniphan Moriarty
38. FBI file on Jacqueline Cotton
39. FBI file on Christopher Martinson
40. FBI file on Andrew Rotstein
41. Michigan State Police file on Jeffrey Forrest
42. Detroit FBI office DE 100-40021-SUB A
43. June 20, 1974 FBI Photos of NCLC office
44. June 25, 1974 FBI Nitel from Detroit to Director
45. June 21, 1974 FBI Nitel from Detroit to Director
46. June 27, 1974 FBI Bufile Memorandum
47. July 10, 1974 FBI Letterhead Memorandum (LHM) from Detroit SAC to FBI Laboratory
48. July 29, 1974 Laboratory Report to Detroit SAC

49. July 31, 1974 FBI Airtel from Detroit SAC to Director
50. August 5, 1974 FBI Airtel from Detroit SAC to Director
51. August 16, 1973 FBI LHM from Detroit SAC to Baltimore SAC
52. November 15, 1973 Detroit summary report
53. July 18, 1974 FBI Airtel from Detroit SAC to Director
54. Vernon Higgins' 'W' File
55. Vernon Higgins' 'X' File
56. Vernon Higgins' 'Y' File
57. Update FBI LHM from Gerald Fayed to Detroit SAC
58. May 20, 1974 FBI Nitel from Detroit SAC to Director
59. May 24, 1974 FBI FD-306
60. May 29, 1974 FBI FD-306
61. June 18, 1974 FBI LHM from William Jones to Detroit SAC
62. June 20, 1974 FBI Teletype from Detroit to Director
63. June 21, 1974 FBI Nitel from Detroit SAC to Director
64. June 21, 1974 FBI FD-302
65. June 25, 1974 FBI Nitel from Detroit to Director
66. July 18, 1974 FBI Memorandum plus attached FD-302's
67. August 2, 1974 FBI Airtel from Detroit SAC to Director
68. August 2, 1974 FBI FD-302 plus attached statement of Vernon Higgins
69. July 16, 1975 FBI LHM from Robert Meyers to Detroit SAC
70. July 16, 1975 FBI LHM from Philip Mercado to Detroit SAC
71. July 17, 1975 FBI Airtel from Detroit SAC to Director
72. August 12, 1975 FBI LHM from Philip Mercado to Detroit SAC
73. August 13, 1975 FBI LHM from Thomas McNally to Detroit SAC
74. August 14, 1975 FBI LHM from Gerald Fayed to Detroit SAC
75. August 14, 1975 FBI LHM from Thomas McNally to Detroit SAC
76. August 16, 1975 FBI Memo from Detroit SAC to Director
77. Second Amended Complaint, *LaRouche v. Webster*, 75 Civ. 6010 (SDNY) and Answer
78. Pontiac Police Files on Vernon Higgins

79. Any transcripts from the First Trial in this action
80. Any documents currently in the possession of the FBI, or the individual defendants
81. July 23, 1973 FBI Airtel from Detroit SAC to Baltimore SAC
82. April 24, 1974 FBI Memo from James McCance to Detroit SAC
83. May 14, 1974 FBI Summary Report
84. May 15, 1974 FBI Airtel Cleveland SAC to Director
85. May 24, 1974 FBI LHM from William Jones to Detroit SAC
86. June 13, 1973 FBI Airtel from Detroit SAC to Cincinnati SAC
87. May 30, 1974 FBI Photographs of 5 Pontiac NCLC members
88. May 30, 1974 FBI Photographs of 2 Pontiac NCLC members and one unknown Detroit member
89. Deposition of James Kinney, *LaRouche v. Webster*

9. *List of Defendants' Exhibits*

90. FBI memorandum from the Director to the SAC in Detroit dated 5/13/74 authorizing payment to Higgins
91. FBI memorandum of Gerald Fayed dated 6/12/74 stating Mercado was introduced to source (Higgins) on 6/12/74
92. May 15, 1974, Higgins' payment statement of $35.00
93. May 16, 1974, Higgins' payment statement of $65.00
94. May 23, 1974, Higgins' payment statement of $103.00
95. June 3, 1974, Higgins' payment statement of $65.00
96. FBI memorandum of Philip Mercado dated 8/5/74 concerning his contacts with Higgins
97. FBI memorandum of Edward Ball dated 7/1/74 concerning contact with Higgins
98. FBI memorandum of Edward Ball dated 7/1/74 concerning contact with Higgins' wife

10. *Itemized Statement of Damages*

Plaintiffs seek $1 million per plaintiff in compensatory damages and $5 million per plaintiff in punitive damages.

11. Two Weeks and Three Non-jury Trial

A. Two weeks

B. Three days
C. All parties have waived a jury trial
D. N/A

12. Discussed settlement on August 29, 1985. The defendants will offer no money to settle this case but are willing to forego costs.

/s/
Mayer Morganroth
Attorney for Plaintiffs

/s/
Timothy P. Garren

/s/
Sandra R. Ganus
Attoneys for Philip Mercado and Gerald Fayed

William Rheaume
Attorney fo Vernon Higgins

Horace W. Gilmore
United States District Judge

Date: 9-2-85

Supreme Court, U.S.
FILED
DEC 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-901

In the Supreme Court of the United States

OCTOBER TERM, 1987

KHUSHRO GHANDHI, ET AL., PETITIONERS

v.

GERALD FAYED, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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RICHARD K. WILLARD
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12 pp

QUESTIONS PRESENTED

1. Whether a government informant acting contrary to the instructions of federal agents in allegedly carrying out unconstitutional actions was a "government actor" for purposes of *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

2. Whether petitioners waived any claim that federal agents were grossly negligent in failing to supervise an informant.

3. Whether the "clearly erroneous" standard of Fed. R. Civ. P. 52(a) applies to factual findings made by the district court in a case involving a claim under the First Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-901

KHUSHRO GHANDHI, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 823 F.2d 959. The opinion of the district court (Pet. App. A11-A16) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1987, and rehearing was denied on August 31, 1987. The petition for a writ of certiorari was filed on Monday, November 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In this *Bivens* action,[1], petitioners, members and former members of the National Caucus of Labor Committees (NCLC), allege that respondents, two agents of the

[1] *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

Federal Bureau of Investigation (FBI), Gerald Fayed and Philip Mercado, and a paid informant, Vernon Higgins, engaged in actions violative of petitioners' rights under the First, Fourth, and Ninth Amendments of the Constitution in the course of investigating the NCLC in the early 1970s.

1. Petitioners' original complaint in this case named as defendants the FBI, the Police Department of the City of Detroit, as well as numerous individual officers of the FBI, including respondents Gerald Fayed and Philip Mercado, and individual officers of the Detroit Police, and an informant, respondent Vernon Higgins. The court of appeals affirmed dismissal of all of petitioners' claims against all defendants with the exception of petitioners' *Bivens* claims against Agents Fayed and Mercado and informant Higgins. *Ghandi* v. *Police Dep't of Detroit,* 747 F.2d 338 (1984).

On remand, the district court conducted a five-day trial on petitioners' claims against these remaining defendants. On January 23, 1986, at the close of plaintiffs' case, the district court granted the motions of defendants Fayed and Mercado for dismissal under Rule 41(b) of the Federal Rules of Civil Procedure, finding "as a matter of fact," that Agents Fayed and Mercado "did not place [Higgins in the NCLC and] * * * that they did not instruct him or encourage him to engage in activities designed to disrupt Plaintiffs' activities or discredit their organizations and they did not give him instructions to commit illegal acts" (Pet. App. A12). The court further found that these defendants had told Higgins to "be a follower not a leader and gave him no instructions to steal mail or in any way engage in the activities that were condemned by the Sixth Circuit" (*id.* at A13). Noting that all three defendants had been subjected to cross-examination, the court concluded that Rule 41(b) dismissal was appropriate because "there is no evidence that either of these agents authorized, directed or approved unconstitutional conduct by Higgins" (*ibid.*).

The district court also granted a Rule 41(b) dismissal on the constitutional claims against respondent Higgins. The district court reasoned that it was unnecessary to make findings of fact "as to whether Higgins did or did not commit any specific acts * * * except to find that if any of such acts were committed, he committed them on his own behalf and not on instructions or on behalf of Agents Mercado or Fayed" (Pet. App. A14). The court thus reasoned that "there can be no violation of First Amendment rights by Higgins because an individual acting on his own cannot deprive a person of First Amendment rights, there must be governmental action" (*ibid.*).

2. The court of appeals affirmed. It concluded that it need not review petitioners' allegations of gross negligence, since they had been neither included in the pretrial order nor actively pursued at trial (Pet. App. A6). The court thus upheld the district court's dismissal as to Agents Fayed and Mercado, noting that petitioners had not even challenged as clearly erroneous the findings of fact pertaining to their alleged authorization of unconstitutional action by defendant Higgins.[2]

As to the dismissal of defendant Higgins, the court rejected "plaintiffs' invitation to establish a per se rule that the activities of paid government informants must always be considered government action" (Pet. App. A8). Rather, the court held that "[t]he determination of government action depends on the facts of each case, through 'sifting facts and weighing circumstances' " (Pet. App. A8, quoting *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722 (1961)). The court of appeals held that under that standard, Higgins was not a "governmental actor[]" because the district court specifically found that

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[2] Judge Jones concurred on the understanding that the dismissal as to the two FBI agents was being "affirmed solely because plaintiffs failed to preserve such claims [of gross negligence] for trial" (Pet. App. A10).

any unconstitutional actions committed by Higgins "were committed . . . on his own behalf," that Higgins was already a member of the NCLC when he approached the FBI and offered to become an informant, and that Higgins was paid in that role solely on "a c.o.d. basis" (Pet. App. A8-A9 & n.5).

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or that of any other court of appeals. The court below simply applied the correct legal standards to the facts of this case; its decision is therefore fact-bound and limited to the particular facts of this case. Accordingly, certiorari is not warranted.

1. Petitioners repeat in this Court their claim that "Higgins' status as a paid informant per se establishes that he was a governmental actor" (Pet. App. A7). This claim is wholly without merit.

Petitioners place their principal reliance on this Court's decision in *Hoffa* v. *United States,* 385 U.S. 293 (1966). In that case, while refusing to invalidate a conviction, this Court observed that a government informant is subject to constitutional restrictions (385 U.S. at 311). There, federal agents had directed the informant "to report to the federal authorities any evidence of wrongdoing that he discovered" (*id.* at 298), and the informant thereafter reported defendant's conversations, precisely as directed (*id.* at 296). There was thus no suggestion in *Hoffa* that the informant exceeded the bounds of his instructions. Indeed it was clear that he was in fact acting on behalf of the government in undertaking the challenged activity. In this case, by contrast, the informant engaged in conduct completely at variance with his instructions from the government agents.[3]

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[3] The other authorities relied on by petitioners are of no greater assistance than *Hoffa*. In *United States* v. *Cella,* 568 F.2d 1266, 1282

Petitioners assert that a per se rule is justified because even informants like Higgins act under the "color of law" (Pet. 12-13). However, as noted by the court of appeals, " 'although . . . conduct satisfying the state-action requirement . . . satisfies the statutory requirement [under 42 U.S.C. 1983] of action under color of state law, it does not follow from that that all conduct that satisfies the under-color-of-state-law requirement would satisfy the . . . requirement of state action' " (Pet. App. A8 n.4, quoting *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 935 n.18 (1982)). As the court of appeals held, a factual inquiry is necessary to determine whether there has been state action. See also *Monroe* v. *Pape*, 365 U.S. 167, 185 (1961); *Screws* v. *United States*, 325 U.S. 91, 111 (1945). After such an inquiry, the district court properly concluded that there was no such action here.

2. Petitioners' fact-specific assertion (Pet. 14-18) that the court of appeals erred in failing to construe the pretrial order liberally under Fed. R. Civ. P. 16 to preserve their gross negligence claims against Agents Fayed and Mercado does not merit review by this Court. The plain language of Rule 16[4] would be enough by itself to support the court's refusal to consider the claims, since "[t]he pretrial order filed in the present case contains no allegations of gross negligence, callous or deliberate indifference, or reckless disregard" (Pet. App. A6 (footnote omitted); see *id.* at A39-A45). But in fact, the court of ap-

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(9th Cir. 1978), *United States* v. *Upton*, 502 F. Supp. 1193 (D.N.H. 1980), and the cases cited by petitioners (Pet. 9) involving conversations recorded under 18 U.S.C. 2511, there was no informant conduct beyond what the law enforcement agents had authorized.

[4] Rule 16(e) states that the pretrial order "shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice."

peals' refusal to consider the claims was not based solely on the pretrial order. As that court explained (Pet. App. A6 n.1), petitioners not only failed to request the district court to exercise its Rule 16 authority to modify the pretrail order "to prevent manifest injustice" (Fed. R. Civ. P. 16(e)), they "never adequately brought to the court's attention that they were attempting to hold the agents liable on a theory of gross negligence or deliberate indifference" (Pet. App. A6 n.1).

Thus, petitioners "made no offer of proof as to their alleged claims of gross negligence or deliberate indifference" as required by Fed. R. Evid. 103(a)(2) (Pet. App. A6 n.1). Indeed, they never advised the district court of their gross negligence claims at all, despite the court's repeated statements indicating its view "that negligence was not at issue" (*ibid.*). Instead, petitioners specifically agreed that the pretrial order stated the issues for trial (*ibid.*). The court of appeals is clearly correct in stating that "[petitioners] were under some obligation during [their] colloquies [with the district court] to inform the court of their view of the relevant issues" (*ibid.*).

Even in the court of appeals, petitioners did not assert that the district court erred by failing to construe Rule 16 liberally; they claimed only that they had presented the gross negligence claim during trial because they had asserted that the evidence relating to negligence that the district court had excluded was relevant.[5] Plainly, petitioners' claim that the courts below erred in failing to construe Rule 16 liberally is without merit – petitioners never even requested such a construction from either the district court or the court of appeals.

3. Petitioners' final contention is that the court of appeals applied the wrong standard in reviewing the district

[5] The court of appeals quite properly rejected this claim, noting that simple negligence does not support an action for violation of constitutional rights (Pet. App. A6 n.2).

court's factual findings. They do not assert that the district court's findings, which were based in substantial part on the credibility of the witnesses (including all three respondents (Pet. App. A13)) were clearly erroneous. They claim only that because this is a First Amendment case, application of a de novo standard to review of factual findings is required (Pet. 18). This contention is frivolous.

The clearly erroneous standard of Fed. R. Civ. P. 52(a) applies to review of factual findings in cases raising First Amendment claims, as to all other cases. Petitioners rely principally on the statement in *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984), that in First Amendment cases the courts of appeals have an obligation to " 'make an independent examination of the whole record' " (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964)). But the Court in *Bose* also emphasized that the "standard of review [in such cases] must be faithful to both Rule 52(a) and the rule of independent review" (*ibid.*).[6] The Court explained (466 U.S. at 499-500):

> The conflict between the two rules is in some respects more apparent than real. The *New York Times* rule [of independent review] emphasizes the need for an appellate court to make an independent examination of the entire record; Rule 52(a) never forbids such an examination, and indeed our seminal decision on the Rule expressly contemplated a review of the entire

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[6] The Court also stressed that "[w]e have repeatedly held that [Rule 52(a)] means what it says." 466 U.S. at 498, citing *Inwood Laboratories* v. *Ives Laboratories*, 456 U.S. 844, 855 (1982); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982); *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394-396 (1948). See also *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573-576 (1984); *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 713-714 (1986).

> record, stating that a "finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, [333 U.S. 364] at 395 (emphasis supplied). Moreover, Rule 52(a)) commands that "due regard" shall be given to the trial judge's opportunity to observe the demeanor of the witnesses; the constitutionally based rule of independent review permits this opportunity to be given its due.

In this case, the court of appeals followed precisely the procedure described in *Bose*. It meticulously examined the entire record before sustaining the district court's findings (Pet. App. A6-A9). The fact that it also gave "due regard" (466 U.S. at 499) to the district court's assessment of respondents' credibility surely affords petitioners no legitimate cause for complaint.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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